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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 231

REBA W. THIBAUT, INDIVIDUALLY, AND ON BEHALF OF THE MINOR CHILDREN, JOSEPH L. THIBAUT, JR., ET AL., PETITIONERS

versus

CAR & GENERAL INSURANCE CORPORATION, LTD., UNITED STATES BRANCH, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE FIFTH CIRCUIT,

And

ACCOMPANYING BRIEF IN SUPPORT THEREOF

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No.

REBA W. THIBAUT, INDIVIDUALLY, AND ON BEHALF OF THE MINOR CHILDREN, JOSEPH L. THIBAUT, JR., ET AL., PETITIONERS

versus

EAR & GENERAL INSURANCE CORPORATION, LTD., UNITED STATES BRANCH, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE FIFTH CIRCUIT

---

o the Honorable the Chief Justice and the Associate Justices the Supreme Court of the United States:

The petition of Reba W. Thibaut, appearing individually nd on behalf of her minor children, Joseph L. Thibaut, Jr., nd Mary Charmaine Thibaut, for review by this Court on rit of certiorari of a judgment and decree of the Circuit ourt of Appeals for the Fifth Circuit rendered May 23, 1947, ., 345-349), as amended June 25, 1947, (R., 354), with respect, presents that:

1.

PROVISIONS OF FEDERAL CONSTITUTION, FEDERAL STATUTES AND OF LOUISIANA REVISED CIVIL CODE INVOLVED.

The following provisions of the Constitution of the United States, of the Statutes of the United States and of the Louisiana Revised Civil Code are involved in this application:

Seventh Amendment to the Constitution of the United States:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law."

Section 34 of the Judiciary Act of September 24, 1789, 1 Stat. at L. 92, Ch. 20, 28 U. S. C. A., Section 725:

> "Sec. 725. Laws of States as rules of decision. The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Section 2315 of the Louisiana Revised Civil Code:

> "2315 (2294) (N 1382). Torts—Liability—Survival of action.—Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the children, including adopted children, or spouse of the deceased, or either of them, and in default of these in favor of the surviving father and mother or either of them, and in default of any of the above persons, then in favor of the surviving broth-

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ers and sisters, or either of them, for the space of one year from the death; provided that should the deceased leave a surviving spouse, together with minor children, the right of action shall accrue to both the surviving spouse and minor children; provided further, that the right of action shall accrue to the major children only in those cases where there is no surviving spouse or minor child or children.

If the above right of action exists in favor of an adopted person, such right of action shall survive in case of death in favor of the children or spouse of the deceased, or either of them, and in default of these in favor of the surviving adoptive parents, or either of them, and in default of any of the above persons, then in favor of the surviving children of the adoptive parents or either of them, and in default of these in favor of the surviving father and mother of the adopted person, or either of them, and in default of these, then in favor of the surviving brothers and sisters of the adopted person, or either of them, for the space of one year from the death.

The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child or husband or wife or brothers or sisters or adoptive parent, or parents, or adopted person, as the case may be. (As amended, Acts 1884, No. 71; 1908, No. 120; 1918, No. 159; 1932, No. 159, § 1.)"

2.

SUMMARY STATEMENT OF THE MATTERS INVOLVED

Your petitioners Reba W. Thibaut, appearing individually and as natural tutrix to and for and on behalf of her minor

children, Joseph L. Thibaut, Jr., and Mary Charmaine Thibaut, respectfully present the following facts, to-wit:

First: Your petitioners on February 1, 1946, filed this suit for damages because of the death of their late husband and father (R., 2); suit was filed in the United States District Court for the Eastern District of Louisiana against several defendants; by amended complaint filed April 8, 1946, (R., 24) allowed by order of the same date (R., 31) all defendants were eliminated except Car & General Insurance Corporation, Ltd., insurer of the driver and owner of the truck with which the late Joseph L. Thibaut, husband and father of petitioners, collided. The basis of the jurisdiction of the District Court was diversity of citizenship (R., 24-25). Car & General Insurance Corporation, Ltd., was sued directly under a provision of the Louisiana Statutes authorizing direct action against the insurer (Act 55 of 1930 of the Legislature of Louisiana).

Second: Petitioners seek damages for the death of their late husband and father, caused instantly because of a collision between an automobile in which he was riding and a truck owned by defendant's assured and operated by an employee of the owner who was himself also an assured. Negligence in the maintenance, operation and use of the truck tractor and semi-trailer (sometimes referred to as truck) was charged. (R., 26).

Third: The case was tried to a jury before the late Honorable Adrian J. Caillouet, District Judge (R., 38-42). The jury returned a verdict for plaintiff Mrs. Reba W. Thibaut in the sum of $5000.00 and in favor of each of the two children for $2500.00. (R., 41-42). The jury was polled at the instance

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of defendant and each juror stated individually that the verdict as rendered was his verdict (R., 42).

Judgment was entered on the verdict (R., 316-317), and subsequently the motion of defendant to have verdict and judgment entered thereon set aside and to have judgment entered in accordance with defendant's motion for directed verdict and in the alternative for a new trial, was extensively argued and was denied for written reasons dictated into the record by the late Judge Caillouet (R., 324-335).

Fourth: Briefly, the evidence dealing with the happening of the accident was as follows: The truck tractor and trailer insured by defendant were left standing on the highway at night for several hours; no attempt was made by the insured's driver to summon assistance from Baton Rouge, only nineteen miles away (R., 303) but an attempt was made to get help from New Orleans which was approximately 65 miles away. No lights of any kind were left burning on the rear of these vehicles, as required by law (R., 67, 73, 80, 84, 96, 101, 118, 132). The Court of Appeals concluded as a fact that the truck tractor and semi-trailer became "disabled and immovable in the highway" (R., 346); but from the evidence at least one juror during the trial concluded otherwise, for he asked permission to ask the presiding judge a question and said:

> "This law about the fifteen-foot clearance is not quite clear to me, because I believe that this driver could have pulled off the highway—" (R., 268).

Less than fifteen feet of clear pavement was left opposite the stopped truck-tractor and trailer (see Exhibits D-1 to D-6). If there was one flare placed behind the trailer, it was

burning very weakly, and was improperly placed and was so close to the trailer as to constitute a snare and deception to an approaching motorist, since the law required that such a flare be placed approximately 100 feet to the rear of a stopped truck and that it be visible from a distance of 500 feet, and the most that could be said from the evidence was that the flare was about 15 to 20 feet behind the semi-trailer and was visible for a distance not greater than 150 feet (R., 67, 73, 80, 84, 118). Other motorists had very narrowly escaped colliding with the truck-tractor and trailer shortly before the fatal accident (R., 67, 71, 74, 75, 76). The situation was so dangerous that after the fatal accident several flares were borrowed from a passing motorist and properly set out (R., 85, 106, 201, 306).

There was no generalized fog on the highway (R., 179), but right at the scene of the accident there had just descended at the time of the accident a small pocket of fog (R., 102, 106, 112, 119, 122). Even after the accident, because of the spot of fog at the scene and the absence of lights on the rear of the trailer and the absence of proper flares, a motorist approaching from the rear could see nothing except a flashlight being used by one of the first persons to reach the scene (R., 101, 112).

There were no eye-witnesses to the accident itself; but the tracks left by the automobile showed that in exercising his natural instinct and the first law of nature, the instinct of self-preservation, the automobile driver had attempted to swerve around the truck (R., 105, 119, 121, 123). At the time of the accident a car was approaching from the opposite direction with headlights burning (R., 291); and it is common

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knowledge that oncoming headlights will, either partially or completely, temporarily obstruct a driver's vision so as to prevent him from observing a deceptive obstruction unlawfully blocking the highway ahead of him.

Fifth: The case was appealed to the Circuit Court of Appeals for the Fifth Circuit by the respondent insurer, and although no designation of points on appeal was filed, the appellant urged numerous alleged errors in the admission and rejection of testimony, and in the refusal to give certain charges requested by respondent insurer, and error in overruling the motion for a directed verdict filed by respondent insurer and in not setting aside the verdict and judgment rendered thereon and in not granting a new trial.

The Circuit Court of Appeals, speaking through McCord, J., noticed only the question of the sufficiency of the evidence and reversed the judgment, holding that the verdict of the jury was not supported by the evidence in this record. (R., 345-349, 354).

The Circuit Court of Appeals concluded that the present case could be distinguished from the two recent decisions by the same Circuit Court of Appeals, namely *New Amsterdam Casualty Company vs. Ledoux*, 159 F. (2d) 905, and *Car & General Insurance Corporation vs. Cheshire, et al.*, 159 Fed. (2d) 985, both Louisiana cases, wherein jury verdicts for motorists who were involved in collisions at night because of obstructions unlawfully left in the highway, had been affirmed (R., 347). In its opinion the Circuit Court of Appeals made no mention whatever of the overwhelming evidence to the effect that there were no lights whatsoever on these ve-

hicles which had been left parked on the road for several hours; the Circuit Court of Appeals made no mention whatever of the fact that there was an oncoming automobile which was perceived by the operator of the truck tractor and trailer (who was in the cab of the truck tractor) just before the collision; and the Circuit Court of Appeals stated that one burning flare was placed to the rear of the trailer but failed to mention that the flare, according to *all* the evidence, did not comply with the Law of Louisiana as to visibility or location; and the Circuit Court of Appeals failed to follow the well established principle of Louisiana Law, specifically stated in the case of *Car & General Insurance Corporation, Ltd., vs. Cheshire, et al., supra,* by this very same Court of Appeals, to the effect that:

> "In Louisiana motorists have the right to presume and act upon the presumption that the way is safe for ordinary travel, even at night. This is particularly true where a deceptive obstruction has been negligently placed in his way."

Many, many Louisiana cases, which will be referred to in detail in the brief appended hereto, have stated that in Louisiana no hard and fast rule can be established to determine what is or is not contributory negligence as a matter of law in cases involving rear end collisions. In all cases, the particular and exceptional facts of that case must be examined. Since that is, without question, the Louisiana rule, it follows necessarily that in all such cases a jury question is presented.

The Circuit Court of Appeals seemed impressed by the fact that there was some evidence that shortly before the accident Mr. Thibaut "appeared to have been drinking" (R.,

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346). The Court failed to mention there was substantial evidence that Mr. Thibaut was not intoxicated but had "control of himself" (R., 64, 214-215). This was a question of fact for the jury and we believe it was wrong for the Appellate Court to substitute its judgment for that of the jury. Not a single witness testified that Mr. Thibaut was intoxicated and the mere fact that a person has taken a drink is not, under Louisiana law, enough to justify the conclusion that he was intoxicated or even under the influence of whiskey to any degree (See *Waters, et al. vs. Meriwether Transfer Company, Inc.* (La. App., 1931) 137 So. 578.

Sixth: Petitioners instituted this proceeding to secure a review and reversal of the judgment of the Circuit Court of Appeals and to establish that the Circuit Court of Appeals has deprived the petitioners of their right to jury trial guaranteed by the Seventh Amendment to the Constitution of the United States, and has wrongfully disregarded a jury finding upon issues of fact when such finding was supported by competent evidence.

3.

JURISDICTIONAL STATEMENT

1. The jurisdiction of this Court is invoked pursuant to Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938; U. S. C. A., Title 28, Sec. 344.

2. The date of the original judgment of the Circuit Court of Appeals sought to be reversed is May 23, 1947 (R., 345-349); petition for rehearing was filed June 9, 1947, within the time prescribed by the Rules of the Fifth Circuit Court of

Appeals (R., 350-353); the opinion was amended and the petition for rehearing was denied by a Per Curiam June 25, 1947 (R., 354); on July 1, 1947, the issuance of the mandate was ordered stayed for thirty days from said date.

3. Petitioners invoke the jurisdiction of this Court on the ground that in finding against the petitioners in whose favor a jury verdict had been rendered in the District Court, the Circuit Court of Appeals deprived your petitioners of the right to trial by jury as guaranteed to them by the Seventh Amendment to the Constitution of the United States, thereby deciding a Federal question in a way which conflicts with the Constitution of the United States and with the applicable decisions of this Court holding that no finding of fact made by a jury in a law case upon substantial evidence can be re-examined by the judge or judges of a Federal Court.

4.

QUESTIONS PRESENTED

The following questions are presented in the case at bar, in which the local jurisprudence was applicable since jurisdiction of the District Court rested on diversity of citizenship:

1. In failing to apply the principles of Louisiana Law announced in many Louisiana cases and in *Car & General Insurance Corporation, Ltd. vs. Cheshire, et al., supra,* did the Fifth Circuit Court of Appeals err in refusing to agree with the late Judge Adrian J. Caillouet to the effect that a jury case had been made?

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2. In reversing the judgment of the District Court based on a jury verdict for petitioners did the Fifth Circuit Court of Appeals deny to petitioners the right to trial by jury guaranteed to petitioners by the Seventh Amendment to the Constitution of the United States?

5.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

Your petitioners, the indigent widow and children (one of the children having been born posthumously) of the late Joseph L. Thibaut, are deeply aggrieved by the action of the Fifth Circuit Court of Appeals in reversing substantial judgments based on jury verdicts in their favor for the death of their husband and father. Petitioners request this Court to note that the three circuit court judges who decided this cause are all from states other than Louisiana. The late District Judge Adrian J. Caillouet, who was thoroughly versed in the theory and application of the Louisiana Civil Code and in the jurisprudence of Louisiana by training and experience, held that a jury case had been made. The charge of the Court was full, complete, and thoroughly fair to all parties (R., 244-269). The ruling of the late Judge Caillouet in denying the motion of the respondent insurer to have the verdict and judgment set aside, and alternatively, for a new trial, indicated a thorough study of all the authorities relied upon by the respondent insurer, and a complete analysis of all the testimony (R., 324-335). Said Judge Caillouet:

> "The Court is constrained, no matter how much it is impressed by the earnestness of counsel, to continue

feeling that justice, such as the law wishes done, has actually been done in this case." (R., 335).

Briefly, we submit the following. It is well settled in Louisiana that no hard and fast rule of law can be applied to determine whether or not a motorist is guilty of negligence for failure to see an obstruction in the road ahead of him.

There was abundant evidence in this record to prove that the operator of the truck tractor and trailer was guilty of negligence. The evidence was conclusive to the effect that he had no lights whatsoever on or about the truck tractor and trailer; that the weakly burning flare, if he had any at all behind the trailer, was not properly placed and could not be seen at the distance required by law. These vehicles had been left on the highway several hours, without leaving fifteen feet of clear pavement for the unobstructed passage of other vehicles; and juror No. 11 after having heard all the evidence and having seen pictures of the allegedly disabled vehicles, stated that he believed that the driver could have driven off the highway onto a wide grassy shoulder which would have left the concrete highway free for passage (R., 268). Obviously, from the verdict, the other jurors felt the same way. All of this, under Louisiana Law, amounted to negligence in the maintenance, operation and use of truck tractor and trailer.

It cannot be questioned that this negligence was the proximate cause of the accident. If these vehicles had been moved off the concrete pavement as the juror said they could have been, Mr. Thibaut would not have been killed. Also obviously, if lights had been burning on the rear of the trailer as required by law, Mr. Thibaut could have seen these vehicles sooner and

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could have avoided striking them. Also, obviously, if there had been a flare one hundred feet behind the trailer as required by law, visible for a distance of five hundred feet further as required by law (instead of only one weakly burning flare placed about fifteen or twenty feet behind the trailer and visible for no more than one hundred fifty feet) Mr. Thibaut could have seen the flare sooner and his death would not have occurred.

The respondent insurer pleaded contributory negligence on the part of Mr. Thibaut. The Louisiana Law is clear to the effect that the burden of proving contributory negligence is on the one who alleges it. Accordingly, this burden was on defendant and it was a question for the jury as to whether or not defendant sustained that burden. As above stated, the Louisiana law is that no hard and fast rule can be laid down to determine what is or is not contributory negligence as a matter of law.

There was evidence to show that there was a small pocket of fog right at the scene of the accident which enveloped these vehicles obstructing the highway; there had been no generalized fog along the highway and therefore Mr. Thibaut was justified in driving as fast as he cared to drive. There was no speed limit whatsoever at the place where this accident took place. If there was a pocket of fog which enveloped these parked vehicles, Mr. Thibaut would be excused in law for failing to see them sooner, particularly since they were not properly lighted and proper flares were not placed around them.

There was further evidence that there were oncoming headlights at the time of the acident and the logical inference for the jury to draw was that those headlights blinded Mr. Thibaut, thus preventing him from seeing this unlawfully placed object sooner. Many, many cases in Louisiana have held that a motorist who is blinded by oncoming headlights is excused for running into an unlighted object on the highway.

Irrespective of all these points, it is conceded that there were no direct eye-witnesses to the accident. That being true, a presumption arises that Mr. Thibaut acted with ordinary care, this presumption being founded on the instinct of self-preservation; and petitioners had an absolute right to go to the jury on that presumption alone.

6.

Applicants allege that the rules of this Court have been fully complied with.

CONCLUSION

WHEREFORE, for the reasons stated herein, it is respectfully submitted by petitioners that this case is one calling for the exercise by the Court of its discretionary powers, in order that the errors herein pointed out may be corrected; in order that petitioners may not be deprived of their constitutional right to trial by jury; in order that justice may be done. And to such ends, petitioners respectfully submit that a writ of certiorari should be granted and that this Court should review

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the decision of the Circuit Court of Appeals for the Fifth Circuit and finally reverse it.

REBA W. THIBAUT, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILDREN JOSEPH L. THIBAUT, JR., AND MARY CHARMAINE THIBAUT.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

STATEMENT OF JURISDICTIONAL GROUNDS

A concise statement of the grounds on which the jurisdiction of this Court is invoked will be found in the accompanying petition at page 9.

STATEMENT OF THE CASE

A concise statement of the case containing all that is material to the consideration of the questions presented with appropriate page references to the printed transcript will be found in the accompanying petition at page 3, prepared and presented as required by Rule 12.

SPECIFICATION OF ASSIGNED ERRORS

A specification of the questions involved and of the errors attributed to the Circuit Court of Appeals which are intended to be urged before this Court will be found in the accompanying Petition at pages 10-11, all as is required by Paragraph 2 of Rule 38.

ARGUMENT

We consider first the question of the negligence of the operator of the truck tractor and trailer. Respondent insurer contended that it was disabled and could not have been moved. As previously mentioned, at the close of the evidence, one juror stated otherwise, and all jurors must have concluded otherwise. But assuming that respondent insurer was correct

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in this particular, and that the Circuit Court of Appeals was correct in substituting its judgment on that point for that of the jury, this would not excuse the respondent insurer from liability. In such a case, the law of Louisiana specifically states that:

> "...it shall be the duty of the owner or driver of any such vehicle to remove the same as soon as possible and until removed to protect traffic from same at his responsibility." (Act 286 of 1938 of Louisiana, Section 3, Rule 15—Dart's Louisiana General Statutes, 1939 Edition, Vol. 4, Section 5220.)

This driver of this truck tractor and trailer did not undertake to protect traffic at all; he got in the cab of his truck tractor and trailer and sat there. He made no effort to obtain aid from Baton Rouge only nineteen miles away, where every man on the jury knew there were many competent garages who could have sent aid at once. These large vehicles could have been removed from this highway within thirty minutes or less after they were brought to a stop; but they remained there at night for several hours until this fatal accident occurred. The obvious reason the driver of the truck did not call Baton Rouge for help was because his employer had a mechanic in New Orleans and of course he wanted to save money for his employer by having the employer's own mechanic come to the scene rather than to employ some third person. In this case, as the Jury well knew, this saving of money cost the lives of two men.

With respect to the placing of flares, Act 164 of 1936 of Louisiana, Section 1 as amended by Act 215 of 1942 of Louisiana, Section 2 (Dart's Louisiana General Statutes, 1939 Edi-

tion, Vol. 4, Section 5309.5) provides that the operator of a motor truck or combination of vehicles shall immediately upon bringing his vehicle to a stop upon the travelled portion of a highway, at night, place three lighted flares—one in front of the vehicle approximately one hundred feet, and one at the side of the vehicle, and "one lighted flare approximately one hundred feet to the rear of said vehicle"—and that these flares shall be "plainly visible for a distance of five hundred feet." The Court of Appeals in this case said that there was evidence that one lighted flare was placed to the rear of the trailer, and mentions that the evidence is in conflict as to the distance of the flare. (R., 346). The Court fails to mention that the great preponderance of the evidence was to the effect that the only flare behind the truck was burning very weakly, that it was about fifteen to twenty feet behind the trailer, and that it could not be seen any further away than one hundred fifty feet (R., 66, 67, 73, 80, 84, 100, 118, 137).

Completely aside from the so-called "Flare Statute" of Louisiana, there are many provisions in the Louisiana Highway Regulatory Act requiring lights on vehicles stopped on the highway. Act 286 of 1938 of Louisiana, Section 9, subsection (g), paragraph 24 (Dart's Louisiana General Statutes, 1939 Edition, Vol. 4, Section 5239) specifically states that whenever a vehicle is stopped upon a public road whether attended or unattended, at night, there shall be displayed a lamp "projecting a red light, visible, under (normal atmospheric) conditions, from a distance of five hundred feet to the rear." In other words, Louisiana Law made it mandatory that the lights on the rear end of this trailer be kept burning, and

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that the lights themselves be visible five hundred feet to the rear of the trailer. The evidence was conclusive to the effect that there was no compliance whatsoever with this provision (R., 67, 73, 80, 84, 96, 101, 118, 132). No mention whatever was made by the Circuit Court of Appeals of this violation of a safety statute by the operator of the truck tractor and trailer.

We therefore respectfully submit that there was abundant evidence to the effect that no lights whatsoever were left burning on the parked trailer as required by Louisiana Law; that fifteen feet of clear pavement was not left for the unobstructed passage of other vehicles as required by Louisiana Law; that if there was a lighted flare behind the trailer it was placed only fifteen or twenty feet behind the trailer (instead of one hundred feet as required by law) and was burning weakly and visible only for a distance not exceeding one hundred fifty feet (instead of five hundred feet as required by law); that even if the Circuit Court of Appeals was correct in substituting its opinion for that of the jury as to whether or not these vehicles could have been moved, no timely attempt to get aid from Baton Rouge, Louisiana, where aid was readily available so as to move the vehicles, was made, and no attempt was made by the driver of these vehicles to "protect traffic from same at his responsibility" as required by Louisiana statutory law.

It cannot be doubted that this truck driver was guilty of the grossest kind of negligence.

This case is markedly similar to that of *Hanno vs. Motor Freight Lines* (La. App. 1931, cert. den. by Sup. Ct.), 134 So.

317 where a motorist struck the rear end of a disabled vehicle on the highway at night. The case arose before the so-called "Flare Act" and the only violation charged and proved was that there were no lights burning on the rear of the parked truck. The Louisiana Court said this:

> "Looking for what was the proximate cause of the accident, as we must in order to fix liability, we certainly believe that it was the absence of lights or of any warning whatever of the presence of this large truck at night on the public highway. The State Statute, No. 296 of 1928, § 57, required that the one in charge of that truck display on it 'one or more lamps projecting a white light visible under normal atmospheric conditions from a distance of five hundred feet to the front', and also a red light 'visible under like conditions from a distance of five hundred feet to the rear.' This is not a rigid regulation, and it is a very precautionary one. Had it been complied with in this case, there is little reason to believe that this accident would have occurred."

These plaintiffs of course had the burden of proving that the operator of the truck tractor and trailer was guilty of negligence which proximately caused the accident. Beyond doubt, they carried that burden. If the respondent insurer was to escape liability on its plea of contributory negligence, the burden of sustaining that plea, under Louisiana Law, rested on the respondent insurer. This was specifically charged by Judge Caillouet, without exception to that portion of his charge being raised. (R., 250.) See:

> *Althans vs. Toye Bros. Yellow Cab Company, et al.* (La. Appeal, 1939) 191 So. 717.
>
> *Meyer vs. Rein* (La. Appeal, 1944) 18 So. (2d) 69.

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Nezat vs. General Outdoor Advertising Company (La. Appeal, 1946) 24 So. (2d) 482.

In considering the special plea of contributory negligence, we submit that under Louisiana Law petitioners were entitled to the benefit of two presumptions, and that under either presumption—and certainly under both—it was for the jury to determine whether or not the respondent insurer carried the burden imposed upon it of overcoming those presumptions. In other words, we submit that the petitioners had a right to go to the jury on the presumptions alone.

The first presumption, announced by the Louisiana Supreme Court in the case of *Jacobs vs. Jacobs*, 141 La. 272, 74 So. 992, L.R.A. 1917 F., 253, repeated in more than a score of Louisiana cases thereafter, and announced by this same Circuit Court of Appeals in the case of *Car & General Insurance Corporation vs. Cheshire, et al.*, 159 F. (2d) 985, is that:

> "In Louisiana motorists have the right to presume and act upon the presumption that the way is safe for ordinary travel, even at night."

The late Mr. Thibaut had a right to rely upon that presumption, and to act upon it. That, alone, was sufficient to take this case to the jury.

The second presumption, as expressed in the Louisiana case of *Layne vs. Louisiana Power & Light Company, et al.* (La. App., 1935), 161 So. 29 at page 35, (affirmed after rehearing), 164 So. 345, (judgment amended on rehearing to allow interest), 164 So. 672, is this:

> "... where there are no eye witnesses to any acts of negligence on the part of plaintiff, it is presumed that he acted with ordinary care . . . The reason for this rule of law is that life is dear to the normal person, and that he will not willingly do the thing which will extinguish it, but, on the contrary, will exercise due care to preserve it."

It is conceded that there were no eye-witnesses to this accident, and that there were no eye-witnesses to any acts of negligence on the part of the late Mr. Thibaut. Did the respondent insurer overcome the presumption above mentioned? The jury said no, and this was for the jury to determine. In fact, there was evidence (R., 120) that Mr. Thibaut applied his brakes for a witness testified that he saw tracks behind the car and that "it looked like he tried to slam his brakes, or something"; and there was evidence (R., 123) that Mr. Thibaut tried to swerve around the semi-trailer. Obviously, then, he saw this large object; but he saw it too late to save his life, and his failure to see it sooner was because the driver of the truck tractor and trailer had in so many respects failed to comply with the Louisiana Safety Statutes.

On these two presumptions alone, or on either of them, a case for the jury was made out; and this is particularly true when it is borne in mind that under Louisiana Law the burden of proving contributory negligence was placed upon the respondent insurer, and remained there throughout the trial of the case.

But beyond those presumptions, there was credible evidence offered by petitioners to justify the jury in believing that there were exceptional circumstances which explained

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why Mr. Thibaut did not see this unlighted semi-trailer sooner. The photograph shows that this semi-trailer was of the stake body type and thus it did not present a solid object. As previously indicated, there was abundant evidence that there was no generalized fog along the highway that night, and therefore there was no reason for a motorist to be driving slowly because of any foggy or misty condition of the weather. There was very little traffic on the highway; there was no speed limit fixed at that time; and rapidly moving traffic is the rule on that highway rather than the exception. The highway is referred to as the "Airline Highway." Of course no one knows how fast Mr. Thibaut was driving but we believe he was driving somewhere in the neighborhood of fifty miles an hour, which was perfectly lawful and proper at that time and place.

There was, however, evidence that right at the scene of the accident, so as to envelope the truck tractor and semi-trailer, there was and had just descended a small pocket of fog (R., 102, 106, 112, 119, 122). This was, to use the exact language of the Circuit Court of Appeals in its opinion of May 23, 1947, herein, one of the "exceptional facts and circumstances" (R., 347) which the jury had a right to consider and apparently did consider, and which that Court said may make a case for recovery of damages.

Besides that, the truck driver himself, who testified by deposition on written interrogatories, and who for that reason could not be closely examined on this particular point, gave this very significant testimony in answer to direct interrogatory No. 8 (R., 290-291):

> ". . . was about 11:45 I walked into the front of the truck and sat down. I was watching a car coming towards me, and I heard a car coming at a high rate of speed and all at once there was a crash at the rear of the trailer and I went through the windshield."

We direct Your Honors' particular attention to the statement above that "I was watching a car coming towards me."

It is a matter of common knowledge that oncoming headlights will, either partially or completely, temporarily obstruct a driver's vision so as to prevent him from observing an obstruction blocking the highway ahead of him. Many, many cases in Louisiana have recognized that proposition, and have held in such a situation that a motorist is not negligent in striking an unlighted object in the highway ahead of him when he is temporarily blinded by oncoming headlights. The Fifth Circuit Court of Appeals recognized it in *Car & General Insurance Corporation, Ltd. v. Cheshire, et al.*, supra.

The Circuit Court of Appeals made no mention whatsoever of the above quoted testimony, and failed even to discuss the argument made by petitioners, to the jury, to the late District Judge, and to the Judges of the Circuit Court of Appeals, to the effect that the jury had a right to believe that Mr. Thibaut was suddenly and temporarily blinded by oncoming headlights and therefore this case falls within the many Louisiana cases which permit recovery under such circumstances. We cannot explain the failure of the Circuit Court of Appeals to consider this argument, and at least to mention it. It was urged in brief, in oral argument, and in petition for rehearing. Evidently the Circuit Court of Appeals simply rejected the above evidence for in no other way could the failure of the Circuit

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Court of Appeals to consider this argument, be understood. In rejecting that evidence, the Circuit Court of Appeals invaded the province of the jury and clearly committed error.

If that evidence is accepted—as it must have been by the jury—and if Mr. Thibaut was blinded by the headlights of this oncoming automobile, that recovery is justified under Louisiana Law is beyond doubt. In one of the leading Louisiana cases on this subject, *Gaiennie vs. Cooperative Produce Company, Inc., et al.* (Supreme Court, November 4, 1940, rehearing denied December 2, 1940) 196 La. 417, 199 So. 377, as stated by the Supreme Court the facts were that as plaintiff passed the last of a series of cars whose dazzling headlights caused momentary impairment to his ordinary vision, his car in the meantime covering such distance as its speed carried it, he found himself confronted with the truck parked on the highway without any sign or warning of its presence, some eight or ten feet ahead of him. He struck the rear end of that truck with considerable force, causing very, very serious personal injuries. Recovery was allowed by the Louisiana Supreme Court. We can state to Your Honors with certainty that in every case in which the Louisiana Supreme Court has considered rear end collisions, at night, it has invariably stated that no hard and fast rule can be adopted to determine whether or not the following motorist was guilty of negligence, but that in every single case all of the facts and circumstances must be weighed and considered before a conclusion can be reached. That being the Louisiana rule, it seems too plain for argument that, in a Federal Court, the Seventh Amendment to the Constitution of the United States guarantees that it shall be a jury who shall weigh those facts and circumstances

and who shall determine the ultimate question of fact—that is, was there or was there not negligence.

A great many Louisiana cases have allowed recovery to a motorist colliding with an object on the highway at night. If Your Honors care to examine a few of them, we refer you to the following:

Kirk vs. United Gas Public Service Company (Louisiana Supreme Court, 1936) 185 La. 580, 170 So. 1.

Herring vs. Holicer Gas Company (Louisiana Appeal, 1945, certiorari denied by Supreme Court) 22 So. (2d) 868.

Hanno vs. Motor Freight Lines (Louisiana Appeal, 1931, certiorari denied by Supreme Court) 134 So. 317.

Stafford vs. Nelson Brothers (Louisiana Appeal, 1930, certiorari denied by Supreme Court) 130 So. 234.

Holcomb vs. Perry (Louisiana Appeal, 1932) 138 So. 692.

Williams vs. Campbell, et al. (Louisiana Appeal, 1938) 185 So. 683.

Warnick et al. vs. Louisiana Highway Commission (Louisiana Appeal, 1941) 4 So. (2d) 607.

Holloway vs. Pure Oil Company (Louisiana Appeal, 1931) 135 So. 381, 136 So. 748.

A very recent decision arising from the Eighth Circuit Court of Appeals, which is very similar to the instant case, and in which the Eighth Circuit Court of Appeals simply affirmed by a Per Curiam, is the case of *Hoffman et al. vs. Lippner* (District Court, E. D. Pennsylvania, September 4, 1946) 71 Fed. Supp. 178 (Eighth Circuit Court of Appeals, March 14, 1947) 160 F. (2d) 1022 (Advance Sheets, June 9, 1947).

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In several recent cases Your Honors have indicated that you are consistently following the principle announced in the case of *Jacob vs. City of New York*, 315 U. S. 752, 62 S. Ct. 854 (1942) to the effect that:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by Statute, should be jealously guarded by the Court."

See the following cases:

Lavender vs. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 692 (1946).

Ellis vs. Union Pac. R. Company, 67 S. Ct. 598 (Advance Sheets, February 15, 1947).

Myers vs. Reading Company, 67 S. Ct. 1334 (Advance Sheets, June 15, 1947).

The Louisiana jurisprudence and the Louisiana trained District Judge, who has since departed this life, in the case at bar both agreed that petitioners had made a case for the jury. The decision of the Circuit Court of Appeals below substituted its determination on this point for the verdict of a Louisiana jury. The action of the Circuit Court of Appeals is clearly violative of the Seventh Amendment to the Constitution of the United States, and clearly does not follow the principles laid down by Your Honors in the case of *Jacob vs. City of New York*, supra, and the other cases just above mentioned.

CONCLUSION

Petitioners humbly request this Court to exercise its discretionary powers to the end that justice may be served and that the judgment of the District Court be reinstated.

Respectfully submitted.

MRS. REBA W. THIBAUT, INDIVIDUALLY AND AS NATURAL TUTRIX TO AND FOR THE USE AND BENEFIT OF HER MINOR CHILDREN, JOSEPH L. THIBAUT, JR., AND MARY CHARMAINE THIBAUT, PETITIONERS.

By _____
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Of Counsel for Petitioners.

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CHARLES ELMORE CRO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 231

REBA W. THIBAUT, Individually, and on Behalf of the Minor Children, JOSEPH L. THIBAUT, JR., Et Al.,
Petitioners,

versus

CAR & GENERAL INSURANCE CORPORATION, LTD., United States Branch, a Corporation,
Respondent.

PETITION FOR REHEARING ON THE GRANTING OF A WRIT OF CERTIORARI AND THE REVERSING OF THE JUDGMENT OF THE CIRCUIT COURT OF APPEAL FOR THE FIFTH CIRCUIT
and
ACCOMPANYING BRIEF IN SUPPORT THEREOF.

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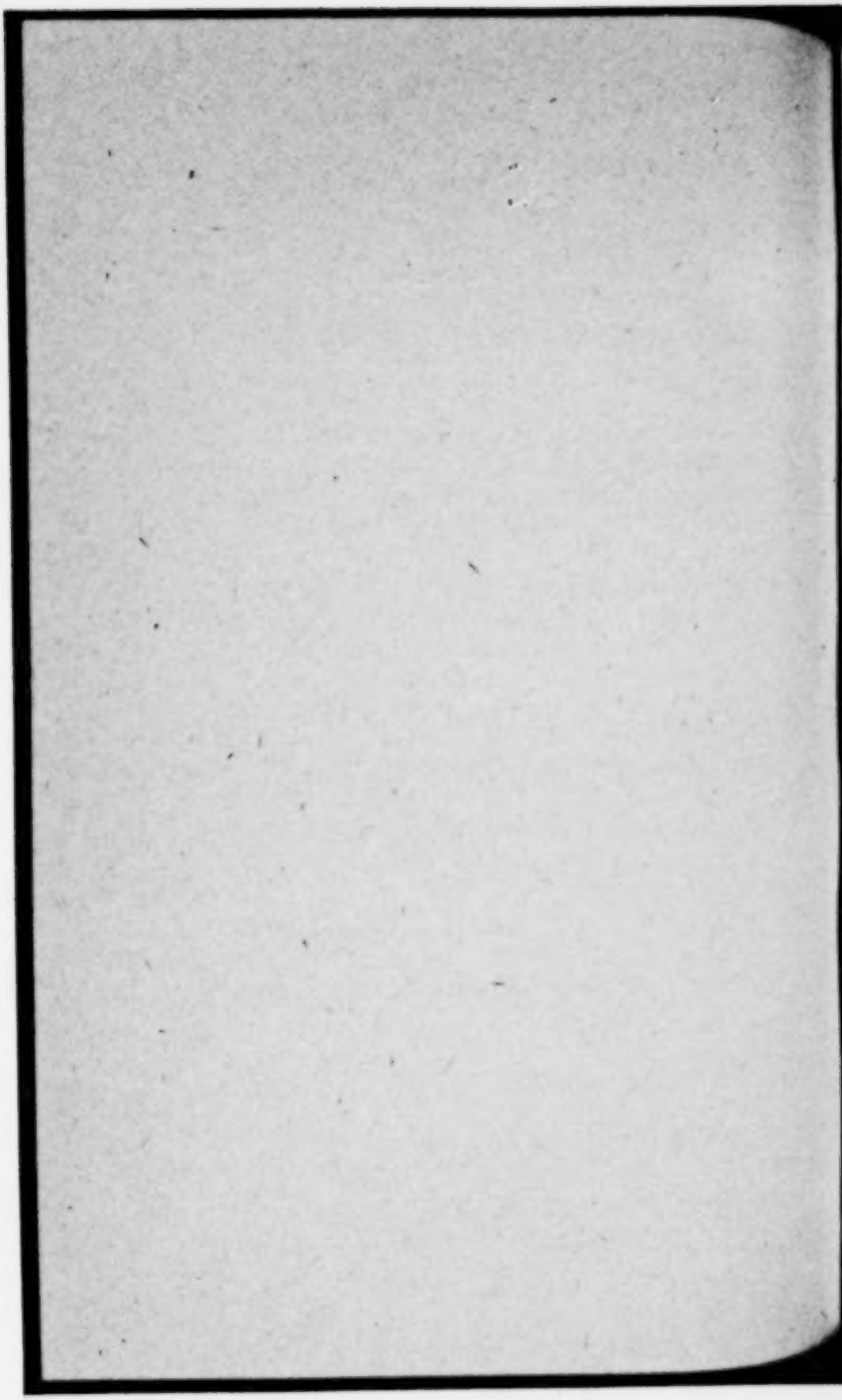

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. 231.

REBA W. THIBAUT, Individually, and on Behalf of the Minor Children, JOSEPH L. THIBAUT, JR., Et Al.,
Petitioners,

versus

CAR & GENERAL INSURANCE CORPORATION, LTD., United States Branch, a Corporation,
Respondent.

PETITION FOR REHEARING ON THE GRANTING OF A WRIT OF CERTIORARI AND THE REVERSING OF THE JUDGMENT OF THE CIRCUIT COURT OF APPEAL FOR THE FIFTH CIRCUIT
and
ACCOMPANYING BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Car & General Insurance Corporation, Ltd., United States Branch, respectfully avers that this Honorable Court erred in entering the per *curiam* it did

in this matter and the *per curiam* should be withdrawn, or, in the alternative, the writ of certiorari should be granted and your petitioner should be given an opportunity to properly present its case in accordance with Rule 43 of this Honorable Court, on which Rule your petitioner relied.

1.

Your petitioner avers that the judgment of the United States Circuit Court of Appeal for the Fifth Circuit on the merits should be affirmed, however the *per curiam* entered on rehearing by the Fifth Circuit Court of Appeal should be withdrawn.

2.

The only negligence alleged in the complaint is that the collision occurred "due to the maintenance, operation and use of the said International truck, tractor and semi-trailer". No negligence was shown at the trial of the case, and your petitioner was entitled to a directed verdict.

3.

Your petitioner shows that the facts in this case are simple: A man named Thibaut and a man named Edmonston proceeded to drink a good deal of whiskey at the Cedar Grove Night Club. They were drunk or nearly drunk. Thibaut was about to get into a fight. The Deputy Sheriff had to appear on the scene, and shortly thereafter, Thibaut and Edmonston proceeded down the highway, as

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fast as Thibaut's Packard car could go and ran into a truck which had lost its right rear wheel and was stopped well over on the right hand side of the highway. The driver of the truck had placed regulation flares, which were burning, approximately 100 feet to the rear and to the front of the truck, and also placed a lighted flare at the side of the truck, as required by law, and in addition thereto, as an extra precaution, placed three regulation red glass reflectors on the highway, six warning signals altogether, even though the law of Louisiana only required three lighted flares, and there was no excuse for Thibaut running into the rear end of the truck and bringing about his death and that of Edmonston. Edmonston's heirs never even filed suit.

4.

In the application for the writ of certiorari, the first and most important case on which applicant relied was that of *Hanno vs. Motor Freight Line, 134 So. 317,* which case has been overruled.

5.

It was impossible to move the truck. Regulation flares were placed forward and aft and at the side of the truck, in accordance with law, and in addition thereto, three red glass reflectors were placed on the highway to warn approaching motorists of the disabled truck on the highway.

6.

Applicant for a writ of certiorari relied on the fact that a juror believed that the truck could have been moved

off the highway. The right rear wheel of the truck was missing and the photographs attached as an appendix to this petition and the brief will conclusively show that the truck and trailer could not be moved off the highway until repairs were made. There is an old Chinese proverb which says "one look is worth a thousand words."

7.

Applicant for a writ claimed that assistance could have been had in Baton Rouge which was nearer to the scene of the accident than New Orleans. This is error because it was Sunday night, the driver did not know a reliable garage in Baton Rouge, a new wheel and new tire was needed, and was sent from New Orleans with dispatch. If there was any negligence on the part of the truck driver (which is denied), such negligence was passive while that of Thibaut was active under the well settled law of Louisiana.

8.

Applicant for a writ of certiorari claimed that there was a small pocket of fog at the scene of the accident. This is error. Seven witnesses who were at the scene of the accident say there was no fog, and these include the Sheriff and the State Highway Troopers. The Weather Bureau reports for New Orleans, Baton Rouge and Donaldsonville (which formed a triangle) showed that there was no fog.

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9.

Applicant for writ of certiorari claims that there were tracks left by the automobile which showed that in exercising his natural instinct and the first rule of nature and self-preservation the automobile driver attempted to swerve around the truck. This is error because the photographs attached as an appendix herein show no tracks of any nature or kind.

10.

It is further claimed that a car was approaching from the opposite direction with headlights burning and it is said to be common knowledge that oncoming headlights will either partially or completely or temporarily obstruct a driver's vision so as to prevent him from observing a deceptive obstruction blocking the highway. There is not a line of evidence in the record to the effect that the oncoming vehicle had bright or blinding headlights and it is not common knowledge that mere oncoming headlights will either partially, completely or temporarily obstruct a driver's vision.

11.

It is admitted by plaintiff's witnesses that lighted flares, and red glass reflectors were placed forward and aft of the disabled truck and the only question in dispute is as to the distance they were placed forward and aft.

12.

In the place where the truck and trailer broke down, the road was level and straight for several miles and it is

the duty of a motorist to drive at night in such a manner as to be able to stop within the distance his headlights illuminate the highway.

13.

That the automobile was a total wreck is shown by the photographs attached conclusively shows excessive speed on the part of a man who had been drinking to excess prior to the accident, to such an extent that a Deputy Sheriff had to be called.

14.

The law of Louisiana requires a motorist to have a driving light to render clearly discernible a person "200 feet ahead".

15.

That there were no exceptional circumstances in this case which would justify recovery in the case of a man who was at least half drunk, running into a parked truck and trailer on a clear night and on a straight road.

16.

Applicant relied on the case of *Car & General Insurance Corporation vs. Cheshire, et al., 159 F. 2d 985*, which was in no manner similar to the case at bar because in that case the defendant's tank trailer had jack-knifed across the road. The front of the truck with headlights

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gave the impression of an approaching vehicle and it was admitted there were no flares placed on the highway.

17.

Applicant made much of the fact that he who alleges contributory negligence must prove it, but applicant failed to state that negligence was denied and contributory negligence was pleaded in the alternative. The record in this case shows no negligence on the part of the truck driver and also that the sole cause of the accident was the negligence of the deceased.

Wherefore, for the reasons stated herein, your petitioner prays for a rehearing in connection with the *per curiam* reversing the Court of Appeal for the Fifth Circuit and remanding this case to the District Court, and your petitioner further prays for an opportunity to be heard in open Court in accordance with Rule 43 inasmuch as this Honorable Court granted a writ of certiorari, and your petitioner further prays for all general and equitable relief.

CAR & GENERAL INSURANCE CORPORATION, LTD.,
United States Branch.

WILLIAM A. PORTEOUS, JR.,
Attorney at Law, Counsel for Petitioner for a Rehearing.

2008 American Bank Building,
New Orleans 12, Louisiana.

THE TESTIMONY.

In order to determine if a directed verdict should have been granted at the conclusion of plaintiff's case, and to determine that this Honorable Court should not reverse the United States Circuit Court of Appeals for the Fifth Circuit, it is necessary to analyze the testimony of the witnesses.

Plaintiff's Witnesses.

George Walker:

Saw Mr. Thibaut (deceased) at about 11:00 P. M. at Cedar Grove Night Club, seemed natural, talked to him. Passed the parked truck shortly before Mr. Thibaut.

> "Q. Before you actually saw those vehicles, or that vehicle, did you see any light behind them, or not?
>
> "A. Well, just almost at the same time that I saw the back end of this big truck, I saw a very dim light. It was drizzling rain and kind of foggy." (P. 65.)

An objection was made to testimony about fog on the ground that there had been no pleading of fog in this case. The original complaint, as filed, alleged it was a **dark, wet, rainy night.** It will be recalled that appellees abandoned their original complaint and were permitted to file an amended complaint in which no mention was made of fog. The objection was overruled on the ground that the witness is presumed to be telling the truth.

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The witness further testified:

"Q. Now, Mr. Walker, about how far were you from that light when you saw the light?

"A. Well, as well as I could judge, I was around, maybe one hundred fifty feet, because after I saw the light there was no time before I was facing the back end—before I was facing the end of it.

"Q. How close was that light to the back end of the truck?

"A. The flare burning behind the truck, I would judge was from fifteen to twenty feet.

"Q. Was there any other burning flare at all out there, except the one you told about?

"A. There was one in front. There were two burning lights.

"Q. Was there any more behind the truck?

"A. Yes, sir; there was one more back of the truck, but it wasn't burning. It was out." (P. 66.)

• • • • • • •

Mrs. Carl Broussard:

Shortly after 9:30 P. M. the witness accompanied by two others **who did not testify** said she passed the parked truck. (To have material witnesses and not to produce them or account for their absence creates a presumption against the party failing to produce them.)

"Q. Now, when you came there, will you state whether or not there were any burning flares about that parked truck, and if so where were they?

"A. There was only one, and it about eighteen feet back, on the ground.

"Q. Back of the truck?

"A. On the ground, on the pavement. Only one, burning.

The witness said she was driving 35 to 40 miles an hour, that it was beginning to mist a little.

Doctor D. C. Broomfield (Coroner):

Saw one flare burning behind the parked truck, didn't remember the distance. Looked like the automobile didn't deviate but ran square into the back of the truck.

Lawrence Lambert (P. 83):

Claims to have been the first to arrive at the scene but is not corroborated by the persons with him, **one of whom testified.** Saw a lighted flare about 20 feet in front and a lighted flare about 18 to 20 feet behind the truck. Lights not burning on the truck or trailer. Saw no reflectors but also saw a dead flare that was out. The flare that was out was picked up underneath the Thibaut car and appellant contends that the Thibaut car ran over this flare and put it out. Claims additional flares were borrowed from a passing truck. **It was not raining, did not mention fog or mist.**

Nora Gautreaux (P. 94):

Passenger in Lambert's car, and claimed to be the third car to arrive at the scene. Saw two lighted flares. One in front and one in back of the truck about 20 feet front and rear. No rain at the scene. Flares were the usual customary regulation flares, said nothing about borrowing flares.

M. C. Stephens (P. 99):

Accompanied by his wife and Mr. and Mrs. Al King. **The ladies did not testify.** (Why we do not know.) Sever-

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al cars had arrived. This witness obviously did not tell the truth as is seen by his signed statement. None of plaintiff's witnesses told the whole truth.

"Q. Well, do you remember, on May 11, 1946, giving me a signed statement to the effect that, 'Flares were in the back and front of the truck, one flare was knocked under the truck.'

"Do you remember saying that?

"A. Yes, sir."

The signed statement is as follows:

"356 "DEF. 16.

"May 11th, 1946.

"M. C. Stephens, (W), 33, address Prairieville, La., Ascension Parish, proprietor of meat market at Prairieville.

"On the night when Thibaut & Edmundson were killed I saw them at Cedar Grove after my wife & I came from the picture show. We were with Mr. and Mrs. Alva King of Prairieville. I saw Thibaut & Edmundson at the bar. Edmundson had a drink but I couldn't swear that the drink was on the bar was Thibaut's because Thibaut was parading up & down in front of the bar. He was mostly talking. It's hard to swear to something if you don't see a man drinking but **if I was on the stand I would have to say that he looked like he had been drinking.** We were there 30 minutes at the most & then we went to Buttary, Louisiana, for a sandwich and after having the sandwich we came to where the wreck was. We were there several minutes before I recognized Thibaut's car it was so battered up—a Packard Coupe. Both

men were dead & Thibaut was half hanging out of the car. Several cars were there before I got there. The car was square in the back of the truck, might have been a little bit to the left but if it was it wasn't much. **Flares were in the back and front of the truck, one flare was knocked under the truck. The flares were burning. There was a slight fog but very slight. I could see.**

"M. C. STEPHENS.

"Witness:

"W. A. PORTEOUS, JR." (p. 315.)

William A. King (P. 110):

A passenger in the M. C. Stephens car. Saw only a flashlight of someone flagging cars about 20 to 25 yards back of the accident. After he got out of his car this witness **saw a burning flare 20 to 25 feet to the rear of the truck.** Didn't see any burning lights on the truck or trailer. Don't remember seeing any reflectors. Quite foggy and misting rain. The witness saw Thibaut and Edmundson at Cedar Grove Night Club.

"Q. Now, could you tell anything by the way Mr. Thibaut or Mr. Edmundson, or both, were talking and acting, as to whether or not they had been drinking?

"A. Well, it seemed they had been drinking, but they didn't either one seem drunk.

"Q. It seemed to you that they had been drinking.

"A. Yes.

"Q. What was it about their talking and acting that impressed you with the fact that they had been drinking?

"A. You can tell by how anybody talks that they had had a few drinks.

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"Q. You mean, he could navigate under his own power?

"A. Yes.

"Q. What was it Mr. Thibaut was doing that caused you to come to the conclusion that he had been drinking?

"A. **Well, he was just talking like most everybody does when they have had a few drinks.**"

Leslie Bourque (P. 117):

Town Marshal of Gonzales, La. About ten people arrived before this witness. **A flare was burning about 20 feet back of the truck.** A flare was burning in front of the truck. No lights burning on truck or trailer, did not see reflectors. Some reflectors were borrowed from a passing truck.

"Q. Now, this flare that was behind the truck, about twenty feet, as you have said—

"A. Just about; yes.

"Q. Could you see that flare as far as five hundred feet away, or not, sir?

"A. No, you couldn't. It had a little pocket of fog during that night. The weather wasn't clear.

"Q. About how close did you get to that flare before you saw the flare itself?

"A. Oh, I'd say one hundred and fifty feet; something like that.

"Q. And the automobile bounced back; it hit the truck so hard it bounced back. Isn't that so?

"A. That's right.

"Q. Now, when you got there, you saw a burning flare aft, or in the back, and burning flare forward. Is that right, sir?

"A. That's right.

"Q. And you also saw a damaged flare, broken flare, underneath the Packard automobile, did you—
"A. I did."

The witness admitted he drove pretty fast to the scene of the accident, therefore it is reasonable to assume that if there was fog it wasn't heavy. Not raining when he arrived. Appellees' witnesses place the truck on its right hand side of the road from 9:30 P. M. to approximately 11:45 P. M., the time of the accident. **The witnesses also admitted this is the main highway between Baton Rouge and New Orleans and many cars were bound to have passed the parked truck.**

Plaintiff rested.

MOTION FOR A DIRECTED VERDICT.

At the conclusion of plaintiff's case a motion was made for a directed verdict. A lengthy argument was made in support of the motion and the motion was denied by the Court.

LAW.

We believe it proper to present to this Honorable Court at this time the law applicable to this case in the hope that this Honorable Court will grant petitioner a rehearing in order that it might be heard before this Honorable Court in accordance with Rule 43 of this Honorable

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Court and in order that the original opinion of the Fifth Circuit Court of Appeals may be reinstated. The law now presented is applicable to the motion to dismiss the action, because the complaint fails to state a claim against appellant upon which relief can be granted as well as the law applicable on the motion to dismiss at the conclusion of plaintiffs' case, and on the motion to dismiss at the conclusion of the entire case and applicable to the "ASSIGNMENT OF ERRORS". The highway was of concrete construction, straight for many miles. Some of plaintiffs' witnesses say nothing of fog or rain, some say a mist, some that there was fog. ALL SAY FLARES WERE BURNING approximately 20 feet forward and aft of the truck. The Packard ran into the rear of the truck disabled on the right hand side of the highway according to all of plaintiff's witnesses.

LIGHTS.

Louisiana Act of 1938, 9 subsection (g) provides that under normal atmospheric conditions, and on a level road the headlights shall produce a driving light sufficient to render clearly discernible a person two hundred (200) feet ahead.

ABILITY TO STOP WITHIN RADIUS OF LIGHTS.

Huddy's Cyclopedia of Automobile Law, Ninth Edition, Volumes 3-4, Section 163, page 301, reads as follows:

> "As a rule, it is the duty of a motorist operating at night to keep the machine under such control and

drive it at such speed that he can stop it within the distance that the highway is illuminated by his lights, and thus avoid collision. . . ."

Kelly vs. Schmidt, 142 La. 91, 76 So. 250:

"He will be presumed, in case of accident to have seen what he should have seen in the performance of his duties."

Also *Canal Steel Works vs. City of New Orleans, 9 La. App. 575, 121 So. 773. Alexandria Refining Co. vs. Missouri Pacific, 1 La. App. 470. Pottet vs. Robinson Lumber Co., 10 La. App. 760, 123 So. 155.*

EVEN IF THERE WERE NO LIGHTS ON THE TRUCK AND TRAILER PLAINTIFF CANNOT RECOVER.

In *Parlongue vs. Leon, 6 La. App. 18,* the Orleans Court of Appeal held:

"It is negligence to stop an automobile upon the highway after dark without headlights or back lights. But this negligence does not justify another automoblie to run into it negligently, nor absolve it from responsibility if, by the use of ordinary care, the collision could have been avoided. The question whether the plaintiff had lights in front or rear of his automobile at the time of the accident is asserted by the plaintiff and denied by the defendant. Assuming that the plaintiff had no lights at all, he can fail to recover only if defendant in the absence of those lights could not have avoided the collision by the exercise of proper care."

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In *Pollet vs. Robinson Lumber Co., La. App., 123 So. 155,* commonly known as the mule case:

> "Conceding, then, arguendo, that the driver of the mules was negligent in not having a light on them, the contributory negligence of plaintiff himself was the proximate cause of the collision, because, had he had his car under such control as would have permitted his stopping it within the distance illuminated by his lights, the accident could not have occurred."

Frierson vs. Shreveport Grocery Co., 3 La. App. 44, holds that it is the duty of the driver of an automobile so to regulate the speed of his car as to be able to avoid striking an object when it came within the radius of his lights, and that, if he failed to do so, he was guilty of negligence, barring the right of recovery of damages from anyone he might run into. To the same effect is *Carlise vs. Louisiana Oil Refining Co., 3 La. App. 671,* driving at night in a cloud of dust.

HANNO vs. MOTOR FREIGHT LINES.

Plaintiff relies largely on the case of *Hanno vs. Motor Freight Lines,* 134 So. 317. That case was decided by divided Court. In the case of *Blahaut vs. Cahil, et al.,* 163 So. 195, the same court divided and overruled *Hanno vs. Motor Freight Lines.* In *Blahaut vs. Cahil,* there was involved a collision between an automobile driven by Cahil's minor son, and a truck, the truck being left standing in the road without being guarded, without lights, or signals whatsoever. ~~The Court said~~

DARK WET NIGHT.

Plaintiff alleged that one of the causes of the accident was the fact that **the night was dark, and that it was wet.**

This is all the more reason why Mr. Thibaut should have been driving more carefully. When confronted with danger such as dark, rain, fog, cloud of dust, etc., the driver of a motor vehicle should drive slower and always be able to stop within the range of his headlights. Driving in a cloud of dust plaintiff was not permitted to recover damages. *Carlise vs. La. Oil Refining Co., 3 La. App. 671.* Driving too fast in a fog is negligence. *King vs. Jamstremski, 6 La. App. 335.* Too fast in a smoke screen is negligence. *Dominick vs. Haynes Bros., La. App., 127 So. 31.* Clouds of dust. *Castille vs. Richards, La. App., 157 La. 274.* Heavy smoke from burning grass obscuring the road for several hundred feet. *Dominick vs. Haynes, La. App. 127 So. 31.*

Darkness may be an:

"Obstruction to the view" of the driver. *Ham vs. Los Angeles, 46 Cal. App. 148, 189 Pac. 462. Wurl vs. Watson, 67 Cal. App. 625, 228 Pac. 43.* It is negligence for one to drive a motor vehicle at a greater rate of speed than is prudent under the circumstances. *Russo vs. Aucoin, La. App., 7 So. (2d) 744. Raziano vs. Trauth, La. App., 131 So. 212.*

> "The evidence on the question of the prevalence of fog in the vicinity of the accident is not entirely satisfactory. We will assume, however, since the evidence

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seems to preponderate to that effect, that there was a light fog. In so far as the light is concerned, it is difficult to understand how a light of that small candle power could have seriously affected his view. But, assuming that the light and fog did affect his view he would be required to exercise a degree of caution commensurate with the increased danger these circumstances involved. The fact that he did not see the truck until so close upon it cannot excuse him, for he must be held to have seen what he should have seen, or what a man of ordinary eyesight could have seen, and, if the fog affected his vision, he should have maintained a speed of 20 miles an hour knowing that he was driving on a very narrow thoroughfare."

* * * * * * *

"In the case of Blackburn v. Railroad, 144 La. 520, 80 So. 708, the plaintiff set upon the track of the defendant railroad at 3:20 A. M. of the night and was run over and killed by a train of the defendant company. Suit was filed against the railroad; the defense was contributory negligence, there was judgment for plaintiff. The Court said on p. 529 (of 144 La., 80 So. 708, 712):

"'* * * This train was either running at such rate at speed that it could not be stopped within the distance objects on the track could be seen, or the lights were defective on the train, or the trainmen were not keeping a proper lookout. Whichever may have been the case, that was the proximate cause of injury. If there were any difficulties against seeing, this was all the more reason why greater care should have been used. * * *'

"Huddy on Automobiles, P. 360, S. 307:

"'Reasonable care requires in many cases that the driver of a motor vehicle drive at a slower speed at night than during the day. One restriction on his speed is that he shall keep the machine under such control and operate it at such speed that he can stop the machine and avoid an obstruction or danger or another traveler within the distance that the highway is illuminated by his lights.'

"Also p. 937, S. 715.

"The defendant violated this rule.

"He, and his witness, testified that they did not see plaintiff's car until they came within a few feet of it. The road upon which the defendant was traveling was smooth and straight and his headlights were burning brightly. Nothing obstructed his view."

In *Hogue vs. Akin Truck Line, La. App., 16 So. (2) 366,* an exception of no cause or right of action was maintained where plaintiff ran into a parked truck at night without lights. Plaintiff alleged **"it was dark, rainy, misty and foggy and visibility was poor".**

"Because the night was dark does not excuse plaintiff for running into the truck; and we do not think that because visibility was poor on account of the named atmospheric conditions, he should be absolved from fault as a cause of the accident. The function of bright lights on an automobile is to illumine the surface of the highway ahead so that the presence of dangers to traffic may be revealed in time to avert an accident. It is the driver's duty at all times, especially under conditions as alleged by plaintiff, to

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be on the alert; to steadily watch the road conditions ahead of him, as they are revealed foot by foot, and to keep his car under such control and maintain such speed as is commensurate with conditions and circumstances. The greater the known hazards the greater should be the degree of care exercised.

"For a motorist at night to encounter weather conditions of the sort described by plaintiff is not uncommon; such an experience is not exceptional."

Powell vs. General Accident, La. App., 18 So. (2d) 921. Truck owner who parked his truck next to curb in the city at night with no flares or no lights was permitted to recover against driver of an automobile who ran into the rear of the truck. In the case of *La. Power & Light Co. vs. Saia et al., 188 La. 358, 177 So. 238,* Mr. Justice Higgins maintained an exception of no right or cause of action where plaintiff ran into a truck illegally parked at night and without lights while on the highway. The Court said:

"The plaintiff contends that the plea of contributory negligence is one that must be imposed by the defendants and supported by evidence to show that plaintiff was guilty of contributory negligence. This is unquestionably the usual rule of procedure, but where the plaintiff alleges facts affirmatively showing that he was guilty of contributory negligence, the defendant may rise the issue by exceptions of no right or cause of action. Arbo v. Schulze et al., (La. App.) 173 So. 560; Sizemore v. Yazoo & M. V. R. Co., (La. App.) 164 So. 648; Flotte v. Thomas Egans Sons, Inc., (La. App.) 134 So. 428; Gibbs v. Illinois C. R. F. Co., 169 La. 450, 125 So. 445; Vappi v. Morgan's

Louisiana & T. R. & S. Co. et al., 155 La. 183, 99 So. 31; Chargois v. Morgan's Louisiana & T. R. & S. S. Co., 148 La. 637, 87 So. 499. See also, Aymond v. Western Union Tel. Co., 151 La. 184, 91 So. 671, and 2 c R. C. L., 182 Act No. 21 of 1932 ss9, subd. (g) 1, the State Highway Regulatory Act, requires every vehicle operated on the public highways of the state between one-half hour after sunset and one-half hour before sunrise to be equipped with burning headlights of sufficient strength to make clearly discernible any person on the highway for a distance of 200 feet ahead.

"In applying this provision of the statute, the courts have concluded that a motorist is held to have seen an object, which, by the use of ordinary care and prudence, he should have seen in time to avoid running into it, and that the driver of an automobile is guilty of negligence in driving at a rate of speed greater than that in which he could stop within the range of his vision. O'Rourke v. McConaughey, (La. App.) 157 So. 598-606; Hutchinson v. James & Co., (La. App.) 160 So. 447; Sexton v. Stiles, 15 La. App. 148, 130 So. 821, 828; Blahut v. McCahil, (La. App.) 163 So. 195; Goodwin v. Theriot, (La. App.) 165 So. 342; Waters et al. v. Meriwether Transfer Co., 18 La. App. 18, 137 So. 578.

"It does not appear from the record that the plaintiff at any time offered an amendment to its petition to explain that there were any unusual circumstances which might have puzzled and confused the driver, as a prudent and careful operator, and prevented him from seeing the parked vehicle. Plaintiff was apparently content to rest its case upon the allegations of its original petition.

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"It is our opinion that the plaintiff's petition affirmatively alleges facts showing that its employee was guilty of contributory negligence, because the single and solitary reason assigned for not seeing or discovering the presence of the truck and trailer was that 'it was quite dark'. Under these circumstances the defendants have a right to raise the issue of no right or cause of action, and this is particularly true where the plaintiff was not denied the right to amend its petition to show additional reasons why its employee failed to discern the unlighted parked vehicle."

In the case of *Bates vs. Haden, La. App., 188 So. 751,* a truck was illegally parked on the highway at night and the driver of the truck was attempting to put out a flare, when he was injured by an approaching motorist. The Court of Appeal for the Parish of Orleans said:

"We are convinced that Barrett was driving the truck at a reckless rate of speed and without paying any regard to the hazards of the road. The fact that the night was dark and misty placed upon him the burden of driving more cautiously and at a slower rate. The trailer of the parked truck was painted a yellow color and was easily visible. It is plain to us that Barrett, due to his inattentiveness, failed to notice the presence of the disabled vehicle on the highway until he was nearly upon it, in spite of the fact that it was visible for a distance of at least 300 feet, and that, while he was successful, by swerving sharply to the left, in avoiding a collision with the trailer, he was negligent in not having observed it sooner and in not seeing the plaintiff, who was standing alongside of it with a lighted flare in his hand. We are also satisfied that, at the time Barrett ap-

proached the disabled truck and trailer, he was traveling at a fast rate of speed and that if he actually saw the plaintiff, which we doubt, he observed him at a time when it was too late to do anything about it."

ALLEGED NEGLIGENCE OF TRUCK DRIVER WAS PASSIVE.

In the case of *Rector vs. Allied Van Lines, 198 So. 516,* decided by Mr. Justice Hamiter of the Louisiana Second Circuit Court of Appeal and now on our Supreme Court the facts showed that Rector and two companions parked their Chevrolet car partly on and partly off the highway at night. **A truck ran into the car improperly parked with no lights burning.** The court permitted Rector's widow to recover damages and held:

"Obviously, McCampbell was also negligent in his operation of the truck. Either he failed to maintain the required control of such truck and contravened the well-organized principle of law that a driver of a motor vehicle at night, on encountering view impairing agencies such as bright lights, fog, dust, rain, or smoke, must reduce the speed of the machine so that he will be able to stop it within the distance that the highway is illuminated by the lights; or he was not keeping the proper lookout ahead that the law demands. *His breach of either of these rules of the road constituted active negligence; while the negligence of the occupants of the Chevrolet was only passive.*" (Italics ours.)

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"Under the existing jurisprudence, it must be held in the instant case that *the negligence of McCampbell in failing to exercise due diligence in his driving and to avert the collision, as could have been done was the proximate and immediate cause of the accident, while the negligence of the Chevrolet's occupants was the remote cause; that the last clear chance was with him;* and that plaintiffs are entitled to obtain repairment of the damages occasioned them, notwithstanding their negligence continued to the moment of the accident." (Italics ours.)

To same effect *Hogue vs. Akin Truck Line (supra):*

"plaintiff's negligence was active while that of defendant's agent was passive."

In *Penton vs. Sears Roebuck, La. App., 4 So. (2d) 547,* Mr. Justice Ott said:

"We agree with the trial judge that the negligence of the truck driver in parking the truck had become passive was too remote to be a contributing cause of the accident, and that the negligence of plaintiff's husband was the direct, immediate and proximate cause of the accident."

The last expression of a Louisiana Court on this subject is found in the case of *Michens vs. F. Strauss & Son, La. App., 28 So. (2d) 84,* Advance Sheet dated January 2, 1947.

Plaintiff ran into a parked, unlighted truck and an exception of no right or cause of action was maintained by

the lower court and affirmed on appeal. The appellate court said:

> "The legal question tendered herein is not new. It has been considered and passed on by this court several times recently, and also by the other Courts of Appeal and the Supreme Court, during the past decade.
>
> "The last case decided by this court in which the legal principle involved herein is discussed at length, is that of Hogue v. Akin Truck Iine et al, La. App., reported in 16 So. 2d 366, 368. The facts of that case are quite similar to those of the present case.
>
> "In the Hogue case plaintiff's car collided with a large stationary truck parked over the middle of the highway. No flares were placed to warn motorists of the presence of the truck and there were no burning lights on it at the time of the collision. The excuse for running into the truck was that the night was dark and visability poor on account of mist, fog and rain. An exception of no cause of action was sustained and the suit was dismissed. In the opinion we cited numerous cases upholding the principle that as ated by its headlights. We also cited and discussed a general rule, it was negligence barring recovery of damages for a motorist to drive his car at a speed too great to bring it to a stop within the distance illuminated by its headlights. We also cited and discussed cases in which it was held that due to exceptional facts, conditions and circumstances, recovery was allowed to motorists who drove their cars into the rear end or side of another motor vehicle in the nighttime. Appellant cites and relies upon these exceptional cases. We are quite sure the facts of the

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present case, as disclosed from the petition, do not make it an exception to the general rule.

"In the Hogue case, inter alia, we said:

" 'The Highway Regulatory Act (No. 286 of 1938, § 3, Rule 15 (a) expressly requires of the operator of a truck parked upon the highway at night for any reason, that he see to it that its lights be on, and flares, fore and aft, be set out in order to apprise the traffic of the vehicle's presence. It certainly is negligence to not observe these requirements when it is possible to do so. The same Act Rule 4 (a) also makes it the duty of a motorist to drive at all times carefully and at a reasonable rate of speed, taking into consideration all prevailing conditions and circumstances, including traffic and the road's physical condition. The Act declares that if he fails to observe these rules he is deemed prima facie to be at fault in any accident proximately flowing therefrom.

" 'It has been repeatedly held that when visibility is materially impaired because of smoke, mist, dust, etc., a motorist should reduce his rate of speed to such extent and keep his car under such control as to reduce to a minimum the possibility of accident from collision; and as an extreme measure of safety, it is his duty, when visibility ahead is not possible or greatly obscured, to stop his car and remain at a standstill until conditions warrant going forward. Locks v. Shreveport Laundries, Inc., supra [18 La. App. 169, 137 So. 645].

" 'Because the night was dark does not excuse plaintiff for running into the truck; and we do not think that because visibility was poor on account of the named atmospheric conditions, he should be absolved from fault as a cause of the accident. The

function of bright lights on an automobile is to illumine the surface of the highway ahead so that the presence of dangers to traffic may be revealed in time to avert an accident. It is the driver's duty at all times, especially under conditions as alleged by plaintiff, to be on the alert; to steadily watch road conditions ahead of him, as they are revealed foot by foot, and to keep his car under such control and maintain such speed as is commensurate with conditions and circumstances. The greater the known hazards the greater should be the degree of care exercised.'

"The following quotation from the opinion in Woodley & Collins v. Schusters' Wholesale Produce Company, Inc., reported in 170 La. 527-530, 128 So. 469, 470, is pertinent:

" 'We are not prepared to say that the Court of Appeal erred in its ruling that the proximate cause of the accident was the failure of the driver of the plaintiff's car to reduce his speed, and to have the car under such control as to be ready to stop instantly, when he became blinded by the headlights of the approaching car. The doctrine is stated in 42 C. J. 929, 640, thus:

" ' "A speed which might be reasonable and proper under ordinary circumstances may be excessive and improper where the driver's view of the highway is in any way interfered with, as where he is confused or partly blinded by the headlights of an approaching vehicle, or is driving through fog, smoke, or dust, or his windshield is covered with sleet and snow, or rain." '

" 'In the case of Odom v. Long, La. App., 26 So. 2d 709, this court applied the quoted principle. What was said on the subject is disclosed from Sec-

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tion 2 of the Syllabus. It reads: "The duty of a motorist when his vision is obscured by the lights of an approaching automobile, or for any other reason, is to reduce his speed and bring his automobile under such control as to be able to stop the automobile instantly should conditions require that such action be taken to avert a collision." '

"Regardless of the obvious negligence of defendant's driver, in the respects charged, recovery by plaintiff for the damages he sustained by and through the collision is barred because of his own manifest contributory negligence. As said in one case, we repeat that plaintiff's negligence was active in character while that of defendant was passive.

"For the reasons herein assigned, the judgment appealed from is affirmed with costs."

EVEN IF PLAINTIFF'S HUSBAND HAD BEEN A GUEST IN THE AUTOMOBILE PLAINTIFF CANNOT RECOVER UNDER THE LAW OF LOUISIANA.

In the case of *Horn vs. Barras, La. App., 172 So. 451,* plaintiff was the owner of an automobile being driven by his brother, the front seat was occupied by three persons, namely, the driver, a lady and plaintiff. The car ran into a truck parked illegally on the highway at night. In denying plaintiff the right to recover, the Court of Appeal said:

"The contributory negligence of the driver of plaintiff's car clearly appears from the record, as we read it, and as it is shown that the plaintiff himself, who was seated on the front seat with the driver, had equal opportunity of seeing and observing the condi-

> tions which existed, was aware of the speed at which they were going and the distance they could see ahead of them, had entire control over the car, and yet permitted its operation in such manner, he also must be held negligent, and his negligence having contributed to the accident, stands in the way of his recovery."

In the case of *Penton vs. Sears Roebuck & Co., La. App., 4 So. (2d) 547*, plaintiff was riding in a car driven by her husband which ran into the rear of a truck about 4:00 P. M. which was improperly parked on the highway. The Court in denying recovery said:

> "We agree with the trial judge that that negligence of the truck driver in parking the truck had become passive and too remote to be a contributing cause of the accident, and that the negligence of plaintiff's husband was the direct immediate and proximate cause of the accident."

Orphey vs. Sutton, La. App., 8 So. (2d) 766, approaching motorist held responsible for accident in running into the rear of a parked automobile.

McCook vs. Rebecca-Fabacher, Inc., La. App., 10 So. (2d) 512. In that case, plaintiff who alleged he was a guest, was denied recovery where the automobile in which he was riding crashed into a truck illegally parked on the highway. The negligence of the driver of the car was imputable to the plaintiff on the ground that plaintiff was the sole owner of the corporation which employed the driver of the automobile and the driver's negligence was imputable to him.

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McGehee vs. Stevens et al., La. App., 15 So. (2d) 897. A bus passenger was injured when the bus made a usual and normal stop as a result of the negligence of a motorist approaching from the rear running into the bus. The Court held that the sole cause of the accident was the negligence of the motorist approaching from the rear.

Millett vs. Rizzo, Ia. App., 2 So. (2d) 244. Plaintiff drove to New Orleans as the guest of an automobile salesman and on the way back plaintiff's son was driving. Plaintiff had been to the doctor and was not feeling well. Plaintiff was permitted to recover, but the Court said:

> "According to the manner in which she was feeling she could not be expected to give much of her attention to the road, and relied, as she had a right to, on the careful and attentive driving of the automobile by her son."

Had plaintiff not been sick, it is a proper inference to draw that she would have been required to pay more attention to the road and would not have been entitled to recover damages.

Roberts vs. Eason, 6 La. App 703. Plaintiff was riding with her husband and the car in which she was a passenger collided with an unlighted truck. The Court denied plaintiff the right to recover on the ground that she was equally as negligent as her husband.

In the case of *Toups vs. M. L. R. R. & S. S. Co., 4 La. App. 136,* Mr Justice Bell of the Orleans Parish Court of Appeals denied recovery to the wife where she alleged

that she was the guest of her husband and the car in which they were riding ran into a train

> "Considering the record admissions of both plaintiffs, as shown by their own testimony heretofore quoted, we are compelled to conclude that each of them were recklessly disregardful of the approaching train, and that their negligence in this respect precludes recovery as to either of them.
>
> "Nobel vs. Chicago, Milwaukee & St. Paul Railway Co., 298 Fed. 381.
>
> "Barksdale-Administrator, vs. Southern Railway Company of Kentucky, 261 S. W. 656.
>
> "Bradley vs. Mo. Pac. R. R. Co., 288 Fed. 484.
>
> "Anderson vs. Davis, Director General, 251 S. W. 86.
>
> "We are of the opinion, for the reasons and upon the authorities herein noted, that the judgment of the trial court is erroneous."

FEDERAL CASES.

Realizing that Your Honors follow the well settled law of the state in a case of this kind, we took the liberty of first citing the state law and decisions applicable to this case. We are pleased to note that the Federal Decisions, and particularly those of the Fifth Circuit are in accord with the Louisiana decisions.

Under Louisiana law, motorist entering a fog so dense as to obstruct vision must stop until he is sure of his way, or, if he drives into it, he must proceed at such speed as

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will permit him to stop in distance within which he can see objects in his way. *Shell Oil Co. vs. Slade, 133 Fed. (2d) 518,* Fifth Circuit Court of Appeals. *certiorari* denied. *Slade vs. Shell Oil Co., 64 S. Ct. 75, 320 U. S. 772, 88 L. Ed.*—A footnote to the above case reads as follows:

> "O'Rourke vs. McConaughey, La. App., 157 So. 598; Domininck vs. Haynes Bros., 13 La. App. 434, 127 So. 31; In Castille vs. Richards, 157 La. 274, 102 So. 396, the court held that when two automobiles were coming into a cloud of dust it was inexcusible negligence for the drivers of the automobiles not to have come to a full stop until the dust had subsided. In Raziano vs. Trouth, 15 La. App. 650; 131 So. 212, 213, the court said: 'The fact that he did not see the truck until so close upon it cannot excuse him, for he must be held to have seen what he should have seen . . . and, if the fog affected his vision, he should not have maintained a speed of 20 miles an hour.' Rector vs. Allied Van Lines, La. App. 198 So. 516, holds flatly that the presence of smoke or dust on the road is not the proximate cause of an injury if such fog covered the highway, but the failure to exercise care in driving into the fog is . . . Other cases in point are Maggio vs. M. F. Bradford Motor Ex., La. App., 171 So. 859; Inman vs. Silver Fleet, La. App., 175 So. 436; Hutchinson vs. T. L. James & Co., La. App., 160 So. 447; Penton vs. Sears, Roebuck & Co., La. App., 4 So. (2d) 547, and Russo vs. Aucoin, La. App., 7 So. (2d) 744. This Court has uniformly taken the same view. Smith vs. Southern Railway, 5 Cir., 53 Fed. (2d), 186; Brown vs. Southern Railway, 5 Cir., 61 Fed. (2d), 399; C. F. Thompson vs. City of Houma, 5 Cir., 76 Fed. (2d) 793; C. C. Moore vs. Hayes, 5 Cir., 119 Fed. (2d), 742."

A further footnote to the above case of *Slade vs. Shell Oil Co. (supra)*, 5th Cir., in dealing with sudden emergency wherein Mr. Justice Hutcheson said:

> ". . . the defense of sudden emergency is never available where that emergency is the result of the claimant's previous contributory negligence."

the footnote follows:

> "Walker vs. So. Adv. Bag & Paper Co., La. App., 150 So. 865; Myers vs. Sanders, 189 Miss. 198, 194 So. 300; Harper vs. Holmes, La. App., 189 So., 463; Provost vs. Smith, La. App., 197 So. 905; all holding that the plea of sudden emergency may be availed of only when he who pleads it is himself free from fault and has not contributed to the creation of the emergency. In Pendola vs. State, La. App., 4 So. (2d) 28, the court denying the application of the rule, said that if any emergency arose it was one created by the driver's failure to properly act in time to control his car, while in Meanux vs. Gulf Ins. Co., La. App., 182 So. 158, 161, the court said: 'under the well recognized rule that the driver of an automobile should always have his car under such control, when driving with his headlights on, so as to stop it within the distance which his lights project in front of him, the defendant Potin is bound to be held negligent in this case.'"

In *C. C. Moore Const. Co. vs. Hayes, 119 Fed. (2d) 742*, Mr. Justice McCord of the Fifth Circuit with reference to the alleged negligence of a road contractor in failure to put out lights or road signs at night, said:

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"The conclusion is inescapable that the failure of the appellee to have his car under proper control as he approached and entered the curve was the sole proximate cause of the accident. The defendant's motion for an instructed verdict should have been granted.

"The judgment is reversed."

Brown vs. Southern Railway Company. Pennington vs. Same, 61 Fed. (2d) 399. Mr. Justice Foster of the Fifth Circuit denied recovery to a guest when an automobile ran into unlighted train stopped across the highway on the ground that:

"There is no doubt that the negligence of the driver was the proximate cause of the accident and therefore the passenger could not recover.

"One driving an automobile at night in approaching and entering a part of a roadway, which because of a change in its direction or grade, he cannot see at all until his machine is very near it, is lacking in ordinary care if he fails to keep his machine so under control as to be able to stop it before colliding with a stationary object or obstruction in the roadway ahead, which before it is reached, is disclosed by the automobile lights. Central of Ga. Ry. Co. v. Adams, 39 Ga. App. 557, 147 SE 802; Brinson v. Davis, 32 Ga. App. 37, 122 S. E. 643; Western Union Tel. Co. v. Stephenson, (C. C. A.) 36 Fed. (2d) 47; Wilson v. Lehigh Valley R. Co., (C. C. A.) 38 Fed. (2d) 59."

"The operating an automobile in a city street, where the presence of obstructions is reasonably to be expected, cannot properly assume that there is no obstruction ahead, and he is guilty of a lack of ordin-

ary care if he proceeds along the street without looking for obstructions ahead, or if he drives the machine at such a rate of speed that it cannot be stopped within the distance that objects ahead of it can be seen by him. Gregory v. Slaughter, 124 Ky. 345, 99 S. W. 247; 8 L. R. A. (N. S.) 1228, 128 Am. St. Rep. 402; West Const. Co. v. White, 130 Tenn. 520, 172 S. W. 301; Hammond vs. Morrison, 90 N. J. Law, 15, 100 A. 154." Plaintiff collided with some bicycle racks which had been left in the street.

Western Union Tel. Co. v. Stephenson, 36 Fed. (2d) 47, (Fifth Circuit).

• • • • • • •

"Assuming, however, that the city (of Houma) failed in some duty it owed to the plaintiffs, we are none the less of opinion that the judgment below was right. The driver of the automobile was clearly negligent.

• • • • • • •

"Under these circumstances not only the driver but the other plaintiff as well are barred from any right of recovery; for, as it appears to us, the driver's failure to exercise ordinary care was the proximate and only cause of the accident. As a general rule it is negligence to so drive an automobile at night as that the driver cannot stop it within the distance obstructions on the highway ahead can be seen by the light from the headlights. Lauson v. Fond du Lac, 141 Wis. 57, 123 N. W. 629, 25 L. R. A. (N. S.) 40; 135 Am. St. Rep. 30; Fisher v. O'Brien, 99 Kan. 621, 162 P. 317, L. R. A. 1917F, 610; Weston v. Southern R. Co., 194 N. C. 210, 139 S. E. 237; Smith v. Southern R. Co., (C. C. A.) 53 F. (2d) 186."

Thomas v. City of Houma, La., 76 Fed. (2d) 793 (Fifth Circuit).

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CONCLUSIONS OF LAW.

Federal and State authorities are overwhelming in denying appellees' recovery in a case of this kind, and we firmly believe the complaint should have been dismissed for failure to state a claim upon which relief can be granted. A verdict should have been directed for defendant.

APPELLANT'S TESTIMONY.

Should this Honorable Court be of the opinion that it was proper not to have dismissed the complaint for failure to state a claim upon which relief can be granted and should this Honorable Court be of the opinion that no error was committed in not instructing a verdict for appellant we will now analyze the testimony of appellant's witnesses. to determine if a verdict should have been directed for appellant, and if this Honorable Court should give petitioner an opportunity to be heard before this Honorable Court in accordance with Rule 43.

Ashton E. Compton (P. 48):

Employed by the Mid-State Construction Company. The first person to arrive after the accident.

> ". . . I saw at a distance a burning flare, I immediately came under control. As I approached it closer, I had blinked my lights and I raised them up, I saw there was an accident, so I immediately pulled my car to the left of the road, or which is the west shoulder, . . .

"So, I pulled way over to the left, just ahead of the car, and left all of my lights burning, and I jumped out of my car, seeing that the car had run into the back of this parked truck, and there was a man's body hanging out of the driver's side, which was within one foot of the pavement, I would say.

"Just as I got out of my car, well, Mr. Johnson drove up and we both immediately walked over to the scene of the accident. . . .

"Well, we tried to get the man out of the car, and his legs were pinned in by the motor being pushed back toward the panel of the seat. We tried in every way to get the man out. He was still living. The blood was gushing from his nose and mouth; he was in a gasping condition; gasping for air. So we couldn't get him out. We took the back part of the cushion and put that underneath him to bring the man up level, to that he could die in ease, or be in a level position, or near level position. (P. 50.)

"Q. Did you notice anything unusual about him at that time?

"A. Yes, sir. When I walked up to the scene of the accident, **the odor of liquor was very strong. However, I can't say that the man was drunk. It was just that the odor of liquor was evident; very strong.**

"Q. How many flares did you notice out there, at that time?

"A. Well, there was a burning flare to the south, or the back end of the truck, burning.

"Q. How far, sir?

"A. **About a hundred feet, or approximately one hundred feet. Further back, south, going south, toward New Orleans, there was two reflector flares; one, which was the middle flare, between the burn-**

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ing flare and the furthest reflector south, had been run over.

"To the north end of the truck, there was burning flare, approximately a hundred feet, and I noticed, directly underneath the Packard coupe that there was kerosene flare that had been put out, but it was directly under the oil pan of the Packard coupe when I observed it. Evidently it had been smashed by the said automobile.

"Q. Now, how many reflectors were there, all together?

"A. Three.

"Q. And how many flares were there, all together?

"A. Well, there was three burning flares—two burning and one not burning. (P. 51.)

* * * * * * *

"Q. Yes, sir. Now, north of the truck, I understand you to say, there was one burning flare, approximately a hundred feet. Is that what you said?

"A. Approximately a hundred feet.

"Q. And south of the truck, a burning flare, approximately a hundred feet?

"A. Yes, sir.

"Q. And even still further south than that, two glass reflectors?

"A. That is right.

"Q. One of which gave evidence of having been run over?

"A. Of being run over.

"Q. And there was a flare, damaged and not burning—

"A. Under the Packard?

"Q. —directly underneath the Packard?

"A. Yes." (P. 52.)

* * * * * * *

"Q. Then, if I understand you correctly, there were two lights on the stern, or back of the truck?

"A. One was burning.

"Q. One was burning and one was broken?

"A. Or something; that is right.

"Q. Apparently by the Packard. Is that right?

"A. I imagine it was. It had all the evidence and earmarks of it." (P. 53.)

• • • • • • •

The Packard "hit it practically almost in the center of the tailgate or rear end of the truck".

• • • • • • •

"Q. Did the Packard give any evidence of having veered to the left or right?

"A. Well, the front fender on the left side was a little past the rear wheels of the truck. In fact the right wheels of the truck were off. Evidently the car must have been going real fast when it hit it." (P. 53.)

The truck had been shoved forward approximately 2 to 4 feet: **There were no skid marks or brake marks back of the Packard.** (P. 54.) Evidently the brakes on the Packard were not applied. The truck was on its proper side of the road.

Alden B. Johnson (P. 128).

Summoned by both sides but not used by appellant. A graduate of Louisiana State University, Manager of Auto Hotel in Baton Rouge. Second person to arrive after the accident. Mr. Compton was the first. A flare was burning 20 to 30 feet in front of the truck, a flare was burning 25 to 30 feet in the rear of the truck, and a

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damaged reflector was still further in the rear of the truck, looked like it had been run over, and an unlighted flare was underneath the Packard. Did not notice any skid marks or sliding of tires behind the Packard. No fog at the scene of the accident, it was damp, not raining. No need to use windshield wiper. Flares were regulation. Road was straight.

"A. Apparently, from the force, and the condition of the Packard, I would say that he did hit pretty hard, yes, sir.

"Q. Now, when you got there, Mr. Thibaut was still alive, I believe.

"A. Well, he was conscious—I mean unconscious.

"Q. Unconscious, but still alive?

"A. Yes.

"Q. Did you notice anything about him, in particular, if you please? And if so, what?

"A. Well, he was still breathing, and when Mr. Compton and I tried to get him out of the car, why, **we did notice the odor of liquor.**

"Q. You were sumoned by both sides in this case?

"A. Yes, sir." (P. 134.)

There was no fog or rain at the scene of the accident. (P. 136.) The flares were regulation (p. 137).

Lester Gonzales (P. 142):

Sheriff of Ascension Parish summoned by both sides but not used by appellee. Accident happened on a straight road.

"A. I seen a number of flares. . . . I don't recall exactly how many flares were there, some, possibly four or five; maybe more, maybe less." (P. 144.)

* * * * * * *

A flare was burning 30 to 40 feet back of the Packard.

"Q. Where were they located, with reference to the front and rear of the truck and trailer?

"A. I recall one a good ways back from the truck, and a light, rather: one burning.

• • • • • • •

"A. I would say, roughly, forty—thirty to forty feet back of this car.

"Q. It was burning?

"A. Yes, sir, I remember driving to the left of it to park my car on the neutral ground.

"A. . . . there were flares along the side, front and rear. (P. 144.) There was a bent unlighted damaged flare underneath the Packard. (P. 145.) Two and a half or three feet separated the vehicles, the truck was shoved up or the Packard bounced back.

• • • • • • •

"A. I would observe the car was traveling at a pretty good rate of speed, on account of the impact, and the distance that car was from the point of collision with the truck. I would think it was going pretty fast. I wouldn't try to determine the rate of speed." (P. 148.)

There was a Federal regulation due to the war at the time of the accident fixing the speed limit at 35 miles an hour (p. 148). Did not retain Laurence Lambert, one of appellees' witnesses as a deputy sheriff. The sheriff said he discussed with Vic Mire, the outgoing sheriff, the question of retaining Laurence Lambert and said to Mire that he would not retain Lambert.? Lambert was released from office by Mire prior to Sheriff Gonzales taking office.

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With reference to appellee's witness Lambert, the sheriff said:

> "A. He didn't make a good deputy on account of his running around; he wouldn't serve me properly, as sheriff, on account of his frequent visits to night clubs and so forth.
>
> "Q. Was any drinking involved?
>
> "A. Yes, sir." (P.150.)
>
> • • • • • • •
>
> "A. I thought there was a tail light on the rear of the truck." (P. 151.)
>
> • • • • • • •
>
> ". . . The road was dry and it was cloudy . . . I do know I exceeded the speed limit getting there . . . (P. 153.) Saw no skid marks behind the Packard. Criminal charges were not filed against the truck driver." (P. 153.)

Robert M. Umbach (P. 167):

Automobile and truck repair business in New Orleans for 26 years. Qualified in the state courts on many occasions as to the damage occasioned by automobiles, and the speed of automobiles from observation of the damage.

Mr. Umbach examined the photographs which showed extensive damage to the Packard automobile and the court refused to permit Mr. Umbach to testify as to the speed of the Packard automobile. This is one of the assignments of error. The witness did testify that the car is beyond repair, the damage was extensive and would exceed the value of the car. (P. 170.)

> "Q. Assuming that that car—that photograph represents the actual damage sustained in this par-

ticular accident, are you in a position to say whether or not that shows extensive damage from speed.

* * * * * * *

"The Court:

"The jury cannot be helped by having testimony of that nature presented to it."

It would be impossible to repair the car. Extensive damage was also done to the rear of the truck which naturally leads the author of this brief to say that the automobile must have been traveling at a terrific rate of speed when it struck the rear of the truck. The witness stated that the truck could not be moved under its own power because of the loss of the right rear wheels.

Earl Sequin, State Trooper (P. 174):

No fog, mist or rain. Weather dry.

"Q. When you arrived there, what did you find please?

"A. We found a truck with a wheel off, or tire flat; I don't recall, and it had a Packard imbedded underneath it, with two dead men in it.

"Q. What else did you find, with reference to lights and flares?

"A. Well, we found a flare at the head of the truck and one behind it; and a part of one underneath the automobile.

"Q. Anything else, in the way of flares, lights, or reflectors?

"A. Well, there were some reflectors and lighted flares, kerosene, oil, or whatever they burn.

"Q. And the lights on the truck?

"A. Yes, sir.

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"Q. Where were the lights on the truck?

"A. He had the cab lights and the rear lights burning.

"Q. Mr. Sequin, will you be good enough to tell us where these flares that were burning were seen by you, in your official capacity?

"A. That were burning?

"Q. Yes, sir.

"A. **One at the rear of the vehicle, approximately a hundred feet, and one at the head of approximately the same distance.**" (P. 175.)

"Q. And where was the third flare?

"A. Underneath the automobile.

"Q. What condition was it in?

"A. Damaged and battered up.

"Q. How was it damaged and battered up?

"A. It showed signs of being hit. It was out, and laying over on the side.

"Q. Hit by what?

"A. A vehicle—automobile.

"Q. What about these reflectors? And where were they located?

"A. The reflector flares were opposite the kerosene, or oil flares.

"Q. Yes, sir. In what condition were these? And how many reflectors were there, and in what condition were they in?

"A. As well as I remember, there was one down, where the lower light was burning, and one at the head, but I don't remember where the third one was." (P. 175.)

H. Lee Arledge, State Trooper (P. 176):

"A. Yes, sir. The Packard had run into the rear of the truck.

"Q. What did you find on the roadway?

"A. **We found three burning flares and three reflector type flares. That is a total of six, and they were placed, what I would call, properly; about one hundred feet in front of the truck, one of them; one burning flare and one reflector flare; one burning flare near the rear of the truck, and one burning flare—one reflector and one burning; and the same thing about a hundred feet behind the truck.**

"Q. You say they were properly placed?

"A. Yes, sir.

"Q. Is that statement on your official report?

"A. Yes, sir.

"Q. Will you read it to me, from your official report.

"Mr. Hardin:

"Now, if your Honor please; I don't object to that, but I don't want him to read any other hearsay matter that may be on there. He might accidentally get into something else there.

"By Mr. Porteous:

"Q. No, just that. That is on your official report? (P. 177.)

"A. My statement on the official report says 'Vehicle 1' (which is the truck and trailer) 'was broken down with tire trouble and was stopped in the traffic lane (right lane) with three reflectors and three lighted flares, properly placed on the highway." (P. 178.)

The Court refused to permit the witness to read further from his official report (P. 179) and in Louisiana such official reports are admissible in evidence.

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The official report showed that the weather was cloudy. There is a place on the report to put a check mark if the weather is clear, cloudy, rainy, snowing, fog or specify other.

"Q. . . . what did you check mark off at that time, when you made that report?
"A. Cloudy." (P. 179.)
"Q. Did you mark off fog?
"A. No, sir." (P. 180.)

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"Q. Now, did you get close enough to the occupants of the car to tell whether or not they gave any evidence or indication of having been drinking whiskey?
"A. Yes, sir; I examined them closely.
"Q. What was the result of your examination?
"A. **They had been drinking.**
"Q. Yes, sir." (P. 180.)

One flare was under the Packard and had apparently been struck. (P. 181.)

• • • • • •

"Q. In what condition was it?" (P. 181.)
"A. That flare had apparently been struck with something because it was damaged; it had some scars on it, much like you would find if it had been struck on the concrete."

These reflectors and flares were the standard approved type. (P. 182.)

• • • • • •

"Q. And you found three reflector flares and three burning type flares, but only two burning?

"A. That is right.

"Q. One approximately a hundred feet ahead and one approximately a hundred feet to the rear.

"A. That is right." (P. 182.)

No arrest was made.

The accident happened on the Airline Highway between Baton Rouge and New Orleans and is a much traveled highway particularly on a Sunday night. (P. 183.) The highway is patrolled. The officer did not know if a patrol car passed between 9 P. M. and the time of the accident at 11:45 P. M. It is reasonable to assume that on such a heavily traveled highway a patrol car would have passed in the approximately 2 hours and 45 minutes and had there been anything wrong with the placing of flares a highway patrolman would have required the truck driver to properly place his flares.

Walter J. Urban (P. 289) (Deposition):

The truck driver, age 46. When the truck became disabled put out flares and reflectors. There was no fog or mist.

"A. **I had three flares and three reflecting flares. In other words, there were six flares altogether.**

"11. If you have answered the previous interrogatory by stating that you did have flares and reflectors, please state how many you had and what, if anything, you did with them?

"A. They were spaced approximately, the first flare out a hundred feet away from the truck each way.

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There was four flares between them and the truck." (P. 291.)

• • • • • • •

"14. What did you do if you did anything, with the flares and reflectors?

"A. **Well, I stuck one a hundred feet in front of the trailer; that was a lighted flare; and one hundred feet behind, a lighted flare; and the third lighted flare was right aside of the truck. The other flares was between them.**" (P. 292.)

When the witness referred to other flares he meant "REFLECTORS".

After placing the flares and reflectors the witness telephoned his employer, Mr. Fabacher, then returned to the disabled truck, stood around awhile, got in the cab and while in the cab . . .

". . . I heard a car coming at a high rate of speed and all at once there was a crash at the rear of that trailer. . . . and two men were dead." (P. 291.)

Headlights on the truck were put out but all trailer lights were burning at the time of the accident, flares were burning and reflectors were on the highway.

"A. Yes, I seen, about a dozen automobiles passed me there from the time I walked back until the accident happened, and I also heard the vehicle approaching that hit the truck.

• • • • • • •

"A. Well, I heard it coming. It sounded like an airplane coming to me. I just thought to myself, well,

there is somebody, either an airplane crashing or somebody is trying to make a racetrack out of the highway, and all at once it just hit. That's all I realized at the time I scrambled out of the truck and looked back there and I seen the car there and the men. I stopped the first two cars. (P. 293.)

* * * * * * *"

"A. When I seen those men back there I stopped those cars; made those fellows get out. They got their flashlights and was flagging the first cars that come; one come each way. They sent for the state highway man at Baton Rouge, and they then sent the other car to Gonzales for the sheriff and the ambulance. The ambulance came; he said 'Well, I can't take them out; they are dead.' He said 'We will have to wait for the coroner.' So they went after the coroner. When he come, the sheriff come at the same time. **The sheriff told, 'I can't do anything to you, because you was in the right; you was over the law; you had six flares out instead of three.'** The man testified that was there, said that I had my flares out and everything. Mr. Fabacher's two brothers-in-law took the names of the first two men that came there and the people that seen the accident and everything else. **When the state highway came they took a notation of it. They said 'Well, it is all their fault; not yours.'"** (P. 294.)

The Court's attention is invited to the fact that the truck driver was not arrested.

The road was straight. The truck became disabled about 9 P. M. After the accident all flares were still burning with the exception of the flare under the Packard (the flare damaged by the Packard) (p. 295).

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CROSS EXAMINATION.

"28. Were the shoulders dry or wet the night of the accident?

"A. Dry.

"29. Was it raining or not at the time you brought your truck and trailer to a stop on the paved highway?

"A. No, it wasn't raining." (P. 300.)

The questions asked on cross examination are significant.

"39. Isn't it a fact that you placed one lighted flare only about twenty or thirty feet in front of the truck-tractor?

"A. No.

"40. Isn't it a fact that you placed one lighted flare only about 30 or 40 feet, no more than 40 feet behind the semi-trailer?

"A. No." (P. 302.)

The above was by deposition. The direct and cross interrogatories were prepared long before the trial of the case and indicated that **appellee's witnesses must have at some time said the lighted flare was 30 to 40 feet to the rear of the trailer, otherwise the cross interrogatory would not have been propounded.** It will be remembered that at the trial appellee's witness testified that the burning flare was only 18 to 20 feet to the rear of the trailer.

Fred Bahlinger (P. 187):

President of Kohlmeyer Furniture Company.

"Q. Have you been honored by any fraternal organization? If so, in what capacity?

"The Court:
"For what purpose?

"Mr. Porteous:
"To show the credibility of the gentleman, your Honor.

"The Court:
"The Court is not interested in having the time of the Court and jury so taken up; Mr. Bahlinger is a citizen of prominence in this Parish. I think he is generally known to every member of that jury." (P. 187.)

Appellant was desirous of showing that Mr. Bahlinger had just been elevated to Master of the Fourth Degree Knights of Columbus for the State of Louisiana and that this is the highest state position in the Knights of Columbus and that the Fourth Degree is similar to the Thirty-third Degree in Masonry. We believe that it was prejudicial error not to permit appellant to fully show the credibility of the witness, and this is assigned as error.

There was no fog, rain or mist. (P. 190.)

Mr. Bahlinger was the third person to arrive on the scene. He was preceded by Messrs. Compton and Johnson. (P. 190.)

"Q. What did you find when you got there?
"A. Well, I found, of course, as we approached, as I have mentioned already, this man was flagging down the traffic to avoid any further wrecks, I presume. I saw these flares, and the reflectors there, and quite a few lights; and we pulled up to the ex-

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treme left side, on the shoulder of the road, and I got out of the car. (P. 190.)

• • • • • •

"A. I did see flares, yes.

• • • • • •

"A. There was one flare, way to the back of the trailer.

"Q. You say 'way to the back of the trailer'?

"A. To the Gonzales side. And reflectors were out. One may have been knocked over. There was another flare—I can't remember where it was, but I remember the light very well.

"Q. Do you remember seeing any broken flare, and if so where was it?" (P. 190.)

"A. It was under the damaged car, the wrecked car. It was right under the car.

• • • • • •

"Q. Now, you have used the words 'way to the back'. How far do you believe that was to the back, Mr. Bahlinger?

"A. At the time of the wreck, I stepped it off, but it has been so long I can't remember the number of paces, but I believe sixty or sixty-five feet would be my recollection.

"Q. You are relying on your recollection, at this time?

"A. That is all I have to rely on.

"Q. Did you make any note of the distance, at that time?

"A. Unfortunately, I did not." (P. 191.)

The witness said that he thought that the flare burning to the rear of the truck was a reasonable distance to the rear. (Pp. 191-192.)

• • • • • •

"Q. How far away were you from the burning flare way to the rear of the trailer, when you first observed it on the highway?

"A. That is pretty hard to state. **We saw the lights quite a way off,** as we came up, and slowed down because we were looking for the parked truck. **It was very visible. There were other lights; I presume they were the reflectors.** But I could not swear to that. I presume that is what it was. (P. 192.)

• • • • • •

"Q. —there were three flares; two of them were lighted; one was under the Packard, and there were three reflectors. Is that right?

"A. That is my recollection.

"Q. One of the reflectors, you recollect, was damaged?

"A. It was broken. (P. 192.)

• • • • • •

"Something had run over the damaged reflector." (P. 193.)

It is interesting to note that able counsel for appellees did not cross examine the witness.

Mrs. Fred Bahlinger (P. 193):

Wife of the previous witness, sister of Mr. Fabacher. **No fog or rain but very dark.**

"Q. Yes, Ma'm. And tell us what you saw.

"A. Well, as we came along there, we saw these

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flares, and these lights that were around this wrecked truck, and there was a man flagging us down, with a flashlight, to slow us up, because this car had been wrecked there, and he wanted to direct the traffic.

"Q. You didn't get out of the car, you say?

"A. No, not at all. (P. 194.)

"Q. Are you in position, then—how many lights or flares did you see, if you saw any?

"A. Five or six. **The truck was well lined with lights; flares and reflectors.**" (P. 195.)

Hubert A. Fabacher (P. 196):

Owner of the truck and no longer a defendant. All of his trucks are equipped with three flares and three reflectors, all regulation. The law only requires three of either. Walter J. Urban called him at 8:45 P. M. to say he had 2 blowouts and a broken wheel. The mechanic was located and sent to the scene. The vehicle could not be moved under its own power. A garage man from Baton Rouge was not dispatched to the scene because in the past Mr. Fabacher had difficulty getting service out of Baton Rouge, particularly on a Sunday, therefore, Mr. Fabacher's mechanic, A. P. Hickman went to the scene with the necessary tools, parts and welding equipment. The driver said the truck could not be moved under its own power (p. 197). When the truck returned the flares were checked and one was "mashed up". "There were other flares in the trailer, and I presume they were used on the scene of the accident." (P. 200.)

The "mashed up" flare is evidently the one struck by the Packard and referred to by other witnesses as being damaged and under the Packard.

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A. E. Gautreaux (P. 212):

Deputy Sheriff. Detailed at Cedar Grove Night Club on the night of the accident. Mr. Thibaut had been drinking the deputy sheriff separated Thibaut and Clarence St. Amant.

> "A. The way it was, it was very crowded at the place at the time, and I was on the restaurant side. They called me to the scene. I walked up there, and he and Mr. Clarence St. Amant were lock-armed. I walked up to them and put both arms over there (indicating) to keep any lick from being passed, and I asked them to separate, in the name of the law. They both looked at me, recognized me, and they separated peacefully, and they shook hands.
>
> "Q. Yes, but you say you know he had been drinking?
>
> "A. **Well, it seemed like he was intoxicated.**" (P. 213.) (Meaning Thibaut the driver of the Packard.)

Albert P. Hickman (P. 221):

Mechanic for 36 years, went to scene of the accident to repair the truck. On arrival lights were seen on the truck and trailer and flares and reflectors on the highway.

The witness estimated the flare to the rear of the trailer to be 75 feet more or less.

No fog, looked like it had been raining, no mist (p. 223). It was impossible for the truck to be moved under its own power (p. 225).

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REBUTTAL.

Leslie Bourque (P. 226):

Over objections on the ground that it was not rebuttal of anything brought out by appellant this witness was permitted to testify to an alleged conversation with the truck driver. (P. 231.)

> "The Witness:
>
> "I asked him why he didn't have his light on his truck, and I asked him where he was, and he told me he was in the cab, in front, sleeping; and he told me he thought they were on."

To permit the witness to testify in rebuttal as he did at the conclusion of the case was prejudicial error and is one of the "Assignments of Error". We wish to invite the Court's attention to the fact that the alleged conversation did not refer to *"flares and reflectors"*, therefore it is reasonable to assume that if such a conversation did take place *"flares and reflectors"* were on the highway, otherwise the witness would have asked the truck driver why he had not put out and properly placed *"flares and reflectors"*.

Vic Mire (P. 232):

Former sheriff of Ascension Parish testified that Lawrence Lambert worked as a deputy sheriff until June 1st, 1936, when the witness went out of office. It will be recalled that Sheriff Gonzales testified that Vic Mire, then sheriff, let Lawrence Lambert, a witness for appellees, out before his term of office expired. An attempt was made to attack the credibility of this witness as to the

reason why he did not run for re-election as sheriff. No one fails to run for re-election as sheriff in Louisiana if their record is what it should be. At first the witness did not want to answer the question as to why he did not run for re-election when he didn't have any work. Finally he said the reason was he was to be made Warden of the State Penitentiary at Angola by Huey P. Long. **The witness went out of office on June 1, 1936. Senator Long was assassinated September 8, 1935.** See Louisiana State Guide (American Series), published by Hastings House. Senator Long was dead nearly nine months before Mire went out of office. So he obviously did not tell the truth.

> "Q. Do you know this man Lawrence Lambert has, since leaving your office, been found—charged as a treesitter? Sitting in a tree for sixty days, on a main highway, and arrested?
>
> "A. No, sir; I don't know that. He was one of the best deputy sheriffs I had.

MOTION FOR A DIRECTED VERDICT.

A motion was again made for a directed verdict at the conclusion of all the testimony and it is difficult to understand why it was not granted. Under the circumstances here disclosed, it was error to deny the motion to direct a verdict for appellant. We sincerely urge this Honorable Court to grant a rehearing and give petitioner a chance to be heard before this Honorable Court in accordance with Rule 43, or that the Court will reinstate the original opinion of the Court of Appeals.

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In *Pickering vs. Corson,* 108 F. (2) 546, the Seventh Circuit Court of Appeals said:

> "It is true that the question of negligence and contributory negligence are ordinarily questions of fact to be passed upon by the jury. It has, however, come to be regarded as a legal question so far as a motion to direct a verdict is concerned, where upon the uncontroverted facts the minds of all reasonable men must agree upon one conclusion. Campbell vs. Chicago R. I. & P. Ry. Co., 243 Ill. 620, 622, 90 N. E. 1106; Herman vs. Kennare, 190 Ill. 156, 160, 60 N. E. 215, 52 L. R. A. 652, 83 Am. St. Rep. 123; Austin vs. Public Service Co., 299 Ill. 112, 132 N. E. 458, 17 A. L. R. 795."

It is uncontroverted that flares were on the highway and burning fore and aft of the truck and trailer at the time of the accident. The State Highway Act provides that flares shall be placed **approximately** 100 feet fore and aft. The State Troopers and the Sheriff of Ascension Parish were satisfied that flares were properly placed. The truck driver was not arrested. Appellees' witnesses admit flares were on the highway at the time of the accident but they place the flares 18 to 20 feet from the vehicle. Whether flares were properly placed or not is beside the point. **Even if there were no flares appellee is not entitled to recover as a matter of law.**

Where a motorist ran into a train left standing at night across highway crossing without lights, the court held that the proximate cause of the accident was the negligence of the motorist and a guest passenger was not permitted

to recover. *Orton vs. Penn. R. Co.*, 7 F. (2d) 36. The court said:

> "That the collision would not have occurred had the car not been permitted to remain across the highway is beside the question of casual connections. Lang vs. Railroad, 255 U. S. 455, 41 S. Ct. 381, 65 L. Ed. 729; McCalmount vs. Penn. R. Co., (6 C. C. A.) 283 F. 736."

That Thibaut and Edmundson had been drinking prior to the accident cannot be denied. There is no doubt that they were traveling at a terrific rate of speed on a straight highway as is evidenced by the extensive damage to the Packard and to the trailer. Upon the uncontroverted facts we come to the inevitable conclusion that Thibaut, the driver of the Packard, was driving in a negligent manner and thereby brought about his own death.

A motorist was held contributorily negligent in not observing warning signs of railroad crossing and locomotive headlights in time to stop before reaching track, notwithstanding darkness and the fact that neither the bell was rung nor the whistle of the locomotive was sounded. *Wilson vs. Lehigh Valley Ry. Co.*, 38 F. (2d) 59.

In *Hemphill vs. Mississippi Power Co.*, 84 Fed. (2) 971, it was urged that the question of negligence is always for the jury and your Honors held that this is true where there is substantial conflict in the evidence, but where the undisputed facts demand a verdict, it is the duty of the Judge to direct it. *Atchison T. & S. F. Ry. Co. vs. Toops*, 281 U. S. 351; 50 S. Ct. 281; 74 L. Ed. 896.

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In *Gulf M. & N. R. Co. vs. Wells,* 275 U. S. 455; 48 S. Ct. 151, it was held that the Supreme Court will examine the record in a jury case and if it finds that the evidence was not sufficient, in kind or amount, to warrant a finding of negligence, the judgment will be reversed.

CONCLUSION.

We firmly believe that plaintiff did not make out a case before the Jury; that a directed verdict should have been granted; that the ten assignments of error on the part of the trial court as contained in the original record have not been passed on by either the United States Circuit Court of Appeals for the Fifth Circuit or by this Honorable Court; that the judgment of the United States Circuit Court of Appeals on the merits was correct, that the *per curiam* of the aforesaid Court on rehearing should be recalled; that this Honorable Court, in accordance with its Rule 43, should give Car & General Insurance Corporation, Ltd., United States Branch, an opportunity to be heard before this Honorable Court; that your petitioner firmly believes that if this Honorable Court will direct that the certified transcript of the record be sent up to this Honorable Court in order that Your Honors may examine the original photograps, ten in number, which are much plainer than those printed in the Appendix to this brief, and examine the other exhibits in the record, and give petitioner an opportunity to be heard in open court, substantial justice will be done, and it is requested that this Honor-

able Court give your petitioner an opportunity to be heard, all in accordance with Rule 43.

Respectfully submitted,

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New Orleans, Louisiana.

This is to certify that copies of this Brief have been served on opposing counsel on this the 31. day of October, 1947.

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APPENDIX.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

No. 11880.

CAR & GENERAL INSURANCE CORPORATION, LTD., UNITED STATES BRANCH,
Appellant,

versus

REBA W. THIBAUT, individually, and on behalf of the minor children, JOSEPH L. THIBAUT, JR., ET AL.,
Appellees.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

(May 23, 1947.)

Before HUTCHESON, McCORD, and WALLER, Circuit Judges.

McCORD, Circuit Judge: The appeal is from a judgment entered on a jury verdict awarding damages to the widow and minor children of Joseph L. Thibaut who was killed when his automobile ran into the rear

end of a disabled truck and trailer belonging to appellant's assured.

On February 4, 1945, about nine o'clock at night, the loaded truck and trailer unit of appellant's assured was traveling along U. S. Highway No. 11 toward Baton Rouge, Louisiana. One of the trailer's dual right rear wheels came off, the other right rear tire blew out, and the unit became disabled and immovable in the highway on its proper side of the road. The driver of the truck placed burning flares in the highway forward and aft of the disabled unit and sent for help. The evidence is in conflict as to the distance of the flares from the truck and trailer, but it is clear that a burning flare was placed in front of the truck and at least one burning flare was placed in the road to the rear of the trailer. At the place where the truck and trailer broke down, the road was level and straight for several hundred feet in both directions.

About eleven o'clock that night, Joseph L. Thibaut left the Cedar Grove Night Club[1] with a companion and started driving his Packard automobile along U. S. Highway No. 11 in the same direction in which the truck and trailer had been traveling. When Thibaut was seen again, his automobile had crashed into the rear end of the disabled trailer with such force that the automobile was practically demolished and both Thibaut and his companion were killed. There were no eye witnesses to the collision.

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[1] Witnesses who saw Thibaut at the Cedar Grove Night Club shortly before the accident testified that he appeared to have been drinking.

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In Louisiana, one who runs his automobile into a standing object on the highway is hard pressed, in the absence of exceptional circumstances, to make a case for damages against the person leaving the object in the highway. It is the rule that drivers of automobiles must keep their vehicles under such control as to be able to bring them to a complete stop within the range of their vision, and, at night, within the distance in which their headlights project. *Goodwin v. Theriot*, 165 So. 342; *Harper v. Holmes*, 189 So. 463. Headlights on a level road should under normal conditions project a driving light sufficient to render clearly discernable "a person two hundred feet ahead." Sec. 9(g)(1)(12), La. Act 286 of 1938. Moreover, it is the duty of a driver to keep a lookout, and "he will be presumed, in case of accident, to have seen what he should have seen in the performance of his duties." *Kelly v. Schmidt*, 76 So. 250.

These are not hard and fast rules which will operate to defeat recovery in every case in which a motorist collides with a stationary object in the highway. Exceptional facts and circumstances may make a case for recovery of damages. For example, in *New Amsterdam Casualty Co. v. Ledoux*, 159 F. 2d 905, and *Car & General Ins. Corporation v. Cheshire, et al.*, 159 F. 2d 985, (cases relied upon by appellees), this court had occasion to pass upon accidents involving such exceptional facts and circumstances. In the *Ledoux* case, the defendant's ambulance was unlawfully parked on the wrong side of the road and partially on the surfaced portion of the highway in the path of oncoming automobiles, with only two small parking lights showing, and Ledoux was driving along

the highway at a slow rate of speed in a careful manner. In the *Cheshire* case, the defendant's tank-trailer had jack-knifed across the road, creating a deceptive obstruction in the highway at a point less than two hundred feet from the top of an incline, and no flares had been placed in the highway. We pointed out: "The tractor being on its proper side of the road with its lights shining deceived oncoming drivers who did not, and could not, observe the unlighted trailer until they were almost upon it. Leaving this large and deceptive obstruction on the highway was, to say the least, the grossest kind of negligence and a violation of Louisiana law."

The case at bar is in no wise similar to the *Ledoux* and *Cheshire* cases. Here, the defendant's truck and trailer was disabled on a level stretch of the highway. It came to rest on its proper side of the road. Burning flares were placed in the highway. It did not create a deceptive obstruction, for persons driving along the highway could see it if they looked.

Since there were no eye witnesses who saw the collision, the physical facts must be looked to in order to determine what happened. These facts clearly demonstrate that Thibaut left the night club and traveled down the highway at a high rate of speed; and that he either did not keep a proper lookout and did not see what he should have seen in the highway before him, or that he did not have his car under such control as to be able to stop within the range of his vision.[3] From the evidence of

[3] Plaintiffs attempted to show that there were light pockets of fog and mist along the highway about the time of the accident. If such pockets of fog and mist did exist, it was the duty of Thibaut to drive his automobile along the highway with the utmost care and caution, which he did not do. *Hogue v. Akin Truck Line*, 16 So. 2d 366; *Shell Oil Co. v. Slade*, 133 F. 2d 519.

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the plaintiffs and the defendant and the physical facts,[3] the conclusion is inescapable that Thibaut was the author of his own misfortune. The plaintiffs failed to establish a case warranting recovery. Cf. *Goodwin v. Theriot*, 165 So. 342; *Rector v. Allied Truck Lines*, 198 So. 516; *Mickens v. Strauss*, 28 So. 2d 84; *Thompson v. City of Houma*, 76 F. 2d 793; *C. C. Moore Const. Co. v. Hayes*, 119 F. 2d 742.

The verdict of the jury is not supported by the evidence. The defendant's motion for a directed verdict should have been granted. The judgment is

REVERSED.

PER CURIAM: The last paragraph of the opinion is withdrawn and the following substituted therefor:

The verdict of the jury is not supported by the evidence in this record. The judgment is reversed and the cause is remanded with directions that judgment be entered for the defendant unless on a pre-trial hearing the plaintiff can show that other evidence is available which might reasonably change the result, in which event a new trial may be granted.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

IT IS ORDERED that the Petition for Rehearing in the above numbered and entitled cause be, and the same is hereby

DENIED.

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[3] Photographs of the scene and of the trailer and automobile show that the automobile struck the trailer with terrific impact and practically head-on.

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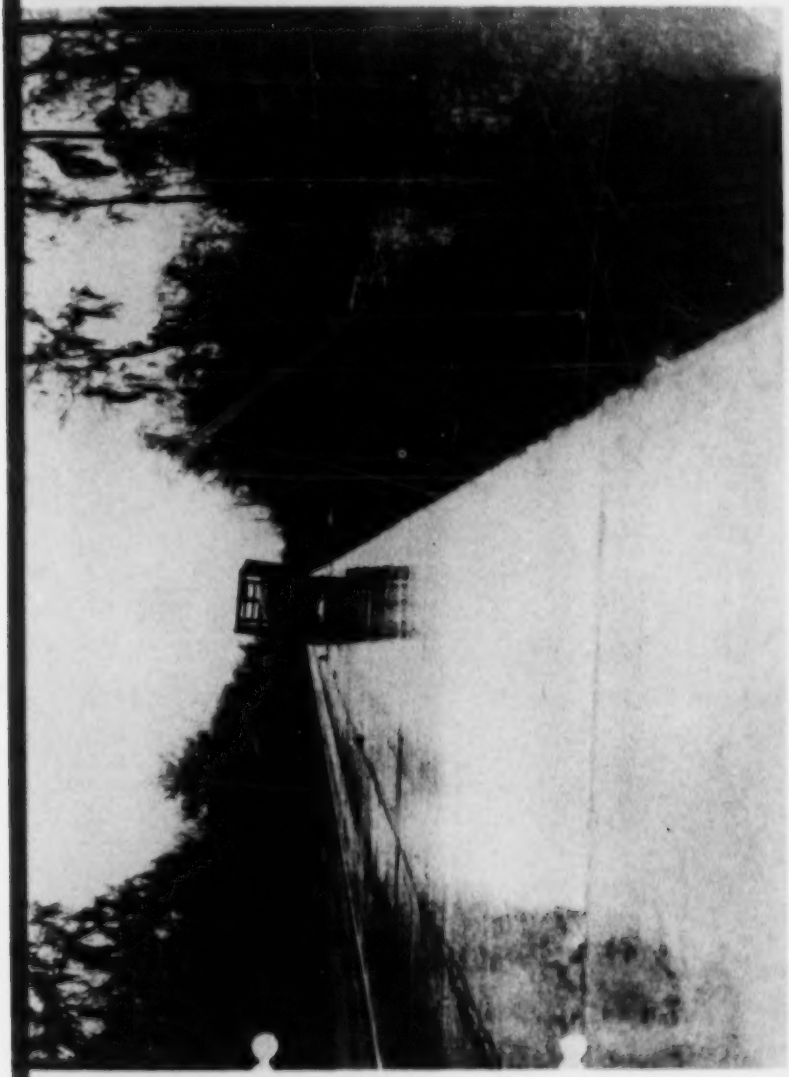

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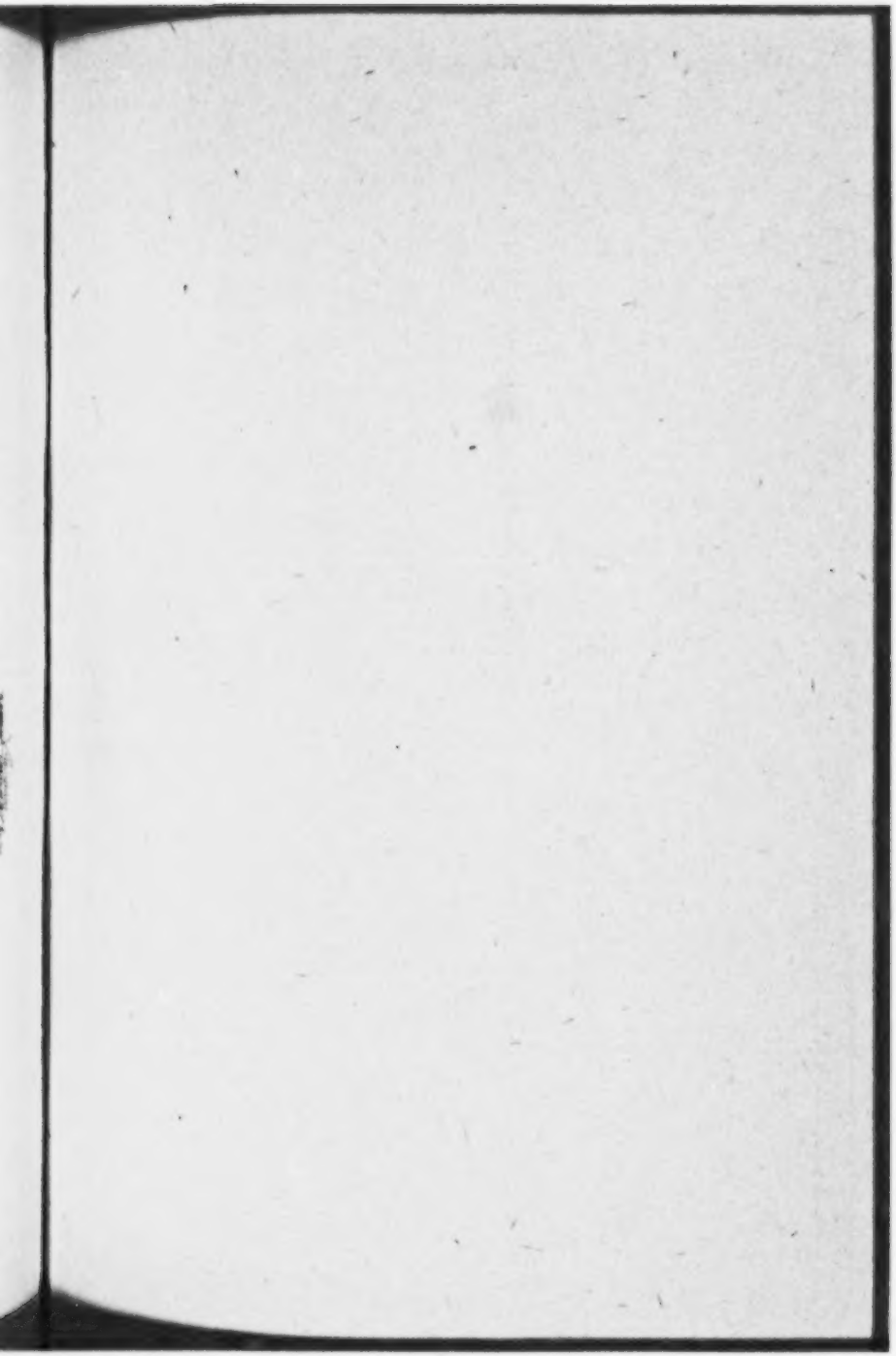

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No. 231. THIBAUT ET AL. *v.* CAR & GENERAL INSURANCE CORP., LTD. On petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. *Per Curiam:* The petition for a writ of certiorari is granted. The judgment of the Circuit Court of Appeals is reversed and the cause is remanded to the District Court. *Fred G. Benton* for petitioners. Reported below: 161 F. 2d 657.